

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922

No. 269

L. VOGELSTEIN & COMPANY, INC., APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED FEBRUARY 9, 1922.

(28,702)

(28,702)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 747.

L. VOGELSTEIN & COMPANY, INC., APPELLANT,

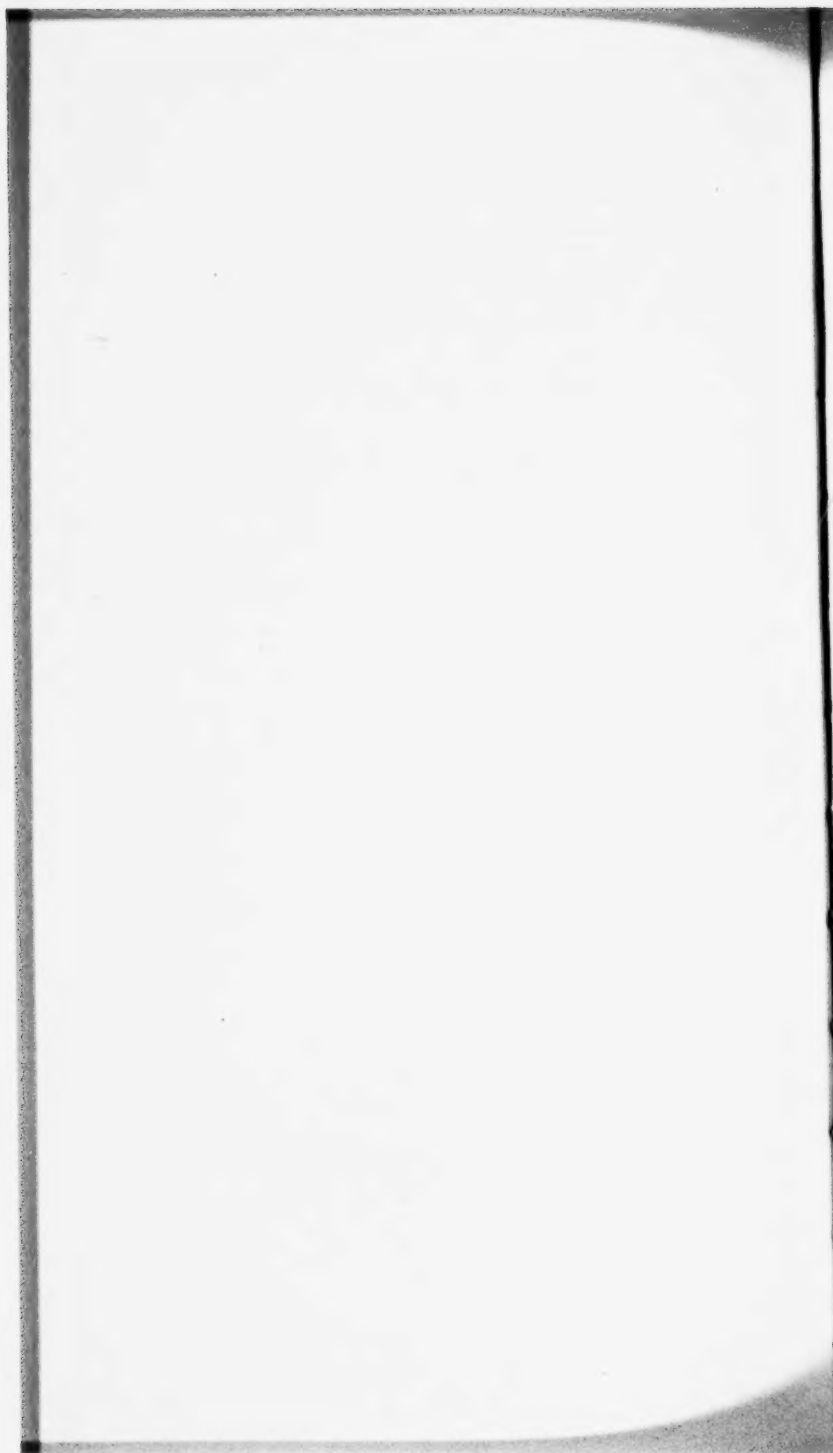
vs.

THE UNITED STATES.

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Court of Claims.

No. 33974.

L. VOGELSTEIN & CO., INC., Claimant,

against

THE UNITED STATES.

1. *Petition. Filed July 2, 1918.*

To the Honorable Judges of the United States Court of Claims:

Your petitioner, L. Vogelstein & Co., Inc., respectfully shows as follows:

I.

That the claimant, your petitioner, is a corporation duly organized and existing under and by virtue of the laws of the State of New York, having its principal office and place of business at No. 42 Broadway, in the Borough of Manhattan, New York City, New York; that it was incorporated in accordance with the provisions of said laws on the 29th day of December, 1916; and that it and all of its officers, directors, stockholders and members have at all times borne true faith and allegiance to the Government of the United States, and that neither it, nor they, nor any of them have or has in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government.

II.

That, at the close of business on the 20th day of September, 1917, your petitioner was the owner of, and in possession of, twelve million five hundred and forty-two thousand eight hundred fifty-seven (12,542,857) pounds of copper, and continuously thereafter retained the ownership and possession of said copper, or the remaining portions thereof, until all of it was ordered, acquired and taken over by the United States, a portion at a time and at different times, as hereinafter specified and set forth.

III.

That all of said copper had been purchased, acquired and taken by your petitioner by virtue of, and as required by, the terms of long-time contracts of purchase, all of which were made before April 6, 1917, when war was declared between the United States and Germany, and all of which were in force when said copper was so purchased, acquired and taken by your petitioner; that the average

necessary cost price to your petitioner of all of said copper was twenty six and 881,977/1,000,000 (26.881977c.) cents per pound, all of which was paid by your petitioner; that your petitioner was compelled by the various sellers to it, in accordance with their rights under and by virtue of said contracts, to purchase and take and pay for, and it did purchase, take and pay for as so required by virtue of said contracts which were in force at the time, all of said copper at said average cost price per pound; that the reasonable value of all of said copper was at least that price, and that fair and just compensation to your petitioner for the same could not be less than said twenty-six and 881,977/1,000,000 (26.881977c.) cents per pound.

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IV.

That by "An Act for making further and more effectual provision for the national defense, and for other purposes," Approved June 3, 1916 (Public No. 85), it is, among other things, provided as follows:

Sec. 120. "The President, in time of war or when war is imminent, is empowered, through the head of any department of the Government, in addition to the present authorized methods of purchase or procurement, to place an order with any individual, firm, association, company, corporation, or organized manufacturing industry for such product or material as may be required, and which is of the nature and kind usually produced or capable of being produced by such individual, firm, company, association, corporation, or organized manufacturing industry.

Compliance with all such orders for products or material shall be obligatory on any individual, firm, association, company, corporation, or organized manufacturing industry or the responsible head or heads thereof and shall take precedence over all other orders and contracts theretofore placed with such individual, firm, company, association, corporation, or organized manufacturing industry. * * * and any individual, firm, company, association, or corporation, or organized manufacturing industry, or the responsible head or heads thereof, failing to comply with the provisions of this section shall be deemed guilty of a felony, and upon conviction shall be punished by imprisonment for not more than three years and by a fine not exceeding \$50,000.

4 The compensation to be paid to any individual, firm, company, association, corporation, or organized manufacturing industry for its products or material, or as rental for use of any manufacturing plant while used by the United States, shall be fair and just."

Sec. 123. "The Secretary of War be, and he is hereby, authorized to prepare or cause to be prepared, to purchase or otherwise procure, such gauges, dies, jigs, tools, fixtures, and other special aids and appliances, including specifications and detailed drawings, as may be necessary for the immediate manufacture, by the Government and by private manufacturers, of arms, ammunition, and special equipment necessary to arm and equip the land forces likely to be re-

quired by the United States in time of war: Provided, That in the expenditure of any sums appropriated to carry out the purposes of this section the existing laws prescribing competition in the procurement of supplies by purchase shall not govern, whenever in the opinion of the Secretary of War such action will be for the best interest of the public service."

V.

That, on or about the 27th day of September, 1917, under and pursuant to the provisions of said act, and in the exercise of all other powers vested in the President by the Constitution and Laws of the United States, as the Chief Executive thereof and as Commander-in-Chief of the Army and Navy thereof, created or called into being by the existence of a state of actual war and by the extraordinary exigencies and requirements thereof, the President of the United States, acting by and through the Secretary of War, placed two orders with your petitioner, each for one million (1,000,000) pounds of said copper, and in each of said orders stated, among other things: "The price to be paid for this material, in accordance with the adoption of a fixed price for copper by the President of the United States, shall be twenty-three and one-half ($23\frac{1}{2}$ c.) cents per lb. f. o. b. New York basis;" that thereafter, under and pursuant to said act and authority and in the exercise of all other said powers, the President of the United States, acting sometimes by and through the Secretary of War and sometimes by and through the Secretary of the Navy, from time to time, placed other and further orders for other portions of said copper with your petitioner, as follows:—during the month of October, 1917, for one million three hundred eighty-nine thousand two hundred ninety (1,389,290) pounds; during the month of November, 1917, for two million nine hundred four thousand twelve (2,904,012) pounds; during the month of December, 1917, for three million four hundred one thousand nine hundred sixty-two (3,401,962) pounds, and during the month of January, 1918, for two million eight hundred forty-seven thousand five hundred ninety-three (2,847,593) pounds and that the entire amount of said copper, for which the President of the United States placed orders with your petitioner as aforesaid, was twelve million five hundred forty-two thousand eight hundred fifty-seven (12,542,857) pounds.

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VI.

That in compliance with said orders placed with your petitioner by the President of the United States, and in obedience to said Act and as required by said act, orders, authorities and powers, your petitioner duly filled and complied with all of said orders and surrendered possession, control and title of all of said twelve million five hundred forty-two thousand eight hundred fifty-seven (12,542,857) pounds of copper to the Government of the United States, and

sold, transferred and made deliveries thereof to and for said Government, as follows:—during the month of October, 1917, two million six hundred eighty-eight thousand four hundred ninety-nine (2,688,499) pounds, delivered a part at a time and from time to time as ordered and directed by said Government, in such quantities and on such days that the average day of delivery for that month was October 18th, 1917; during the month of November, 1917, two million eight hundred fifty-one thousand eight-hundred seventy eight (2,851,878) pounds, delivered a part at a time and from time to time as ordered and directed by said Government, in such quantities and on such days that the average day of delivery for that month was November 17th, 1917; during the month of December, 1917, three million three hundred eighty-two thousand eight hundred forty-four (3,382,844) pounds, delivered a part at a time and from time to time as ordered and directed by said Government, in such quantities and on such days that the average day of delivery for that month was December 20th, 1917; during the month of January, 1918, three million six hundred nineteen thousand six hundred thirty-six (3,619,636) pounds, delivered a part at a time and from time to time as ordered and directed by said Government, in such quantities and on such days that the average day of delivery for that month was January 16th, 1918; but your petitioner, in thus complying with said orders and obeying said act and authority and powers, did not consent nor agree, and it has never consented or agreed nor intended to consent or agree, to accept twenty-three and one-half ($23\frac{1}{2}$ c.) cents per pound in full payment for said copper, or that that amount is just or fair compensation therefor.

VII.

That a price for copper, of twenty-three and one-half ($23\frac{1}{2}$ c.) cents per pound, was determined on and adopted by the President of the United States, on or about the 21st day of September, 1917, and no change in that respect has been made by said President since that time; but that the price or amount so determined on and adopted was not, and is not, fair or just compensation to your petitioner for said twelve million five hundred forty-two thousand eight hundred fifty-seven (12,542,857) pounds of copper, nor for any part thereof; that said price was and is unsatisfactory, and not fair nor just, to your petitioner, who was entitled to receive the same and is also entitled to receive such further payment as will make fair and just compensation for said copper; that your petitioner has received from the Government of the United States, and said Government has paid to it, twenty-three and one-half ($23\frac{1}{2}$ c.) cents per pound for all of said copper, but your petitioner received said payment without waiving any of its rights to further compensation which should be just and fair; and that your petitioner duly notified the Government of the United States and its agents and representatives that your petitioner reserved, and has and does reserve, all its rights to such further payment as would make fair and just its compensation for all of said copper thus necessarily sold,

transferred and delivered by it to the Government of the United States.

VIII.

That twenty-six and 881,977/1,000,000 (26.881977c.) cents per pound, which is the average cost price necessarily paid by your petitioner for all of said copper as aforesaid, is and would be just and fair compensation for the same; that the difference between twenty-three and one-half (23½ c.) cents and twenty-six and 881,977/1,000,000 (26.881977c.) cents is three and 381,977/1,000,000 (3.381977c.) cents per pound; that your petitioner is entitled to be paid by the Government of the United States the further sum of said three and 381,977/1,000,000 (3.381977c.) cents per pound for each and every pound of said copper sold, transferred and delivered by it to said Government; that the just and full sum, to which it is so entitled is three and 381,977/1,000,000 (3.381977c.) cents per pound on twelve million five hundred forty-two thousand eight hundred fifty-seven (12,542,857) pounds of copper, making Four hundred twenty-four thousand one hundred ninety-six and 54/100 (\$424,196.54) dollars, with interest; that your petitioner has duly demanded payment to it of said Four hundred twenty-four thousand one hundred ninety-six and 54/100 (\$424,196.54) dollars, with interest by the Government of the United States, and that no part thereof has been paid.

IX.

Your petitioner, this claimant, further states that no action has been taken on its said claim before Congress, or by or before any department of the United States; except as hereinbefore expressly set forth; and except further that your petitioner has made an application to the War Industries Board of the Council of National Defense for adjustment of its claim, and that said Board has refused to take any action in the matter.

X.

That your petitioner is the sole and only owner of said claim; that no assignment or transfer of said claim or of any part thereof or interest therein has been made, and that said claimant, your petitioner, is justly entitled to the amount above stated and herein claimed from the United States after allowing all just credits and offsets. That, since the 21st day of September, 1917, when a price for copper of twenty-three and one-half (23½c.) cents per pound was determined on by the President of the United States as aforesaid, your petitioner has sold, transferred and delivered to the Government of the United States and its Allies, at that price, large quantities of copper—at least twenty-five million (25,000,000) pounds—which has cost your petitioner substantially the same price (23½c. per pound) and on which it has made no profit whatever, and that your petitioner has not made, and is not now

making, any profit on copper sold, transferred and delivered to said Government or its Allies since said 21st day of September, 1917.

Wherefore, your petitioner, this claimant, prays judgment against the United States in the sum of Four hundred twenty-four thousand one hundred ninety-six and $54/100$ (\$424,196.54) dollars, together with interest as follows: on Ninety thousand nine hundred twenty-four and $42/100$ (\$90,924.42) dollars due on account of said 2,688,499 pounds of copper (at 3.381977 cents per pound) the average date of delivery of which was October 18th, 1917, from said October 18th, 1917; on Ninety-six thousand four hundred forty-nine and $89/100$ (\$96,449.89) dollars due on account of said 2,851,878 pounds of copper (at 3.381977 cents per pound) the average date of delivery of which was November 17th, 1917, from said November 17th, 1917; on One hundred fourteen thousand four hundred six and $97/100$ (\$114,406.97) dollars due on account of said 3,382,844 pounds of copper (at 3.381977 cents per pound) the average date of delivery of which was December 20th, 1917, from said December 20th, 1917 and on One hundred twenty-two thousand four hundred fifteen and $26/100$ (\$122,415.26) dollars due on account of said 3,619,636 pounds of copper (at 3.381977 cents per pound) the average date of delivery of which was January 16th, 1918, from said January 16th, 1918.

L. VOGELSTEIN & CO., INC.,

Petitioner,

By LUDWIG VOGELSTEIN,

Its President,

REEVES & TODD,

Attorneys for Claimant.

Office and Post Office Address, No. 165 Broadway, Borough of Manhattan, New York City, New York.

12 UNITED STATES OF AMERICA,

Southern District of New York,

County and State of New York, ss:

Ludwig Vogelstein, being duly sworn, deposes and says: That he is the President of the Petitioner herein and as such has full power and authority to act for it in this matter and to verify its pleadings and petitions including the foregoing petition; that he has read the foregoing petition and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

That the reason this verification was made by deponent and not by the petitioner is because the petitioner is a corporation.

LUDWIG VOGELSTEIN.

Sworn to before me this 1st day of July, 1918.

ALBERT FRANKEL,

Queens County, No. 1104.

Notary Public.

Cert. filed in Kings County Clerk's Office, No. 55.
 Cert. filed in Kings County Reg. Office, No. 9036.
 Cert. filed in New York Co. Clerk's Office, No. 153.
 Cert. filed in New York Co. Reg. Office, No. 9141.
 Cert. filed in Bronx Co. Clerk's Office, No. 12.
 Cert. filed in Bronx Co. Reg. Office, No. 923.

13 II. *General Traverse. Filed Sept. 3, 1918.*

No demurrer, plea, answer, counterclaim, set-off, claim of damages, demand, or defense in the premises, having been entered on the part of the defendants, a general traverse is entered as provided by Rule 34.

III. *Argument and Submission of Case.*

On May 17, 1921, this case was argued and submitted on merits by Messrs. Albert G. Reeves and Russell H. Robbins, for the plaintiff, and by Messrs. Crowley Wentworth and J. Robert Anderson, for the defendant.

14 IV. *Findings of Fact and Conclusion of Law. Entered June 13, 1921.*

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

Findings of Fact.

I.

The plaintiff is a corporation duly incorporated on December 30, 1916, under the laws of the State of New York, as L. Vogelstein & Co. (Inc.), with a capital stock of \$5,000,000 divided into 50,000 shares of the par value of \$100 each, and having its principal office and place of business in the city of New York, State of New York. The number of the directors and subscribers is given as three each, among whom is the name of L. Vogelstein with an allotment of 48,995 shares, but by arrangements with the other stockholders all of the 50,000 shares were issued to him. The powers of the corporation under its charter are very broad, allowing it to carry on a large number and variety of different occupations, either as principal or agent, among which is the right to deal generally in and with minerals, ores, metals and metalliferous substances.

II.

The sole business of the plaintiff at the time of the transactions complained of in the petition, and still is, the purchasing of ores, minerals, and metals, having them smelted and refined, and then selling the refined products to its customers. It is not a mine owner, operator, producer, or refiner, but a dealer only in ores, minerals, and metals.

III.

At the close of business on September 20, 1917, the plaintiff had on hand, sold but not delivered, and unsold, 43,851,042 pounds of copper, 34,687,579 pounds of which had been purchased as unrefined copper, under long-term contracts, and 9,163,463 pounds had been purchased as refined copper in the open market. The cost of the entire mass was \$11,788,027.17, and the average cost per pound was 26.881977 cents. Of the entire stock of copper on hand on said date, 31,308,183 pounds had been sold at 26.34389 cents per pound. There remained in the ownership and possession of the plaintiff, 12,542,857 pounds, which he had been unable to sell at the same price, owing to the fact that an agreement between the producers of copper and the Government fixing the price of refined copper at $23\frac{1}{2}$ cents per pound would go into effect on September 21, 1917. The difference between the average cost price of the 43,851,042 pounds of copper, 26.881977 cents per pound, and the selling price fixed by said agreement, $23\frac{1}{2}$ cents per pound, was 3.381977 cents per pound. After September 20, 1917, the market price of copper was $23\frac{1}{2}$ cents per pound.

IV.

There is nothing in the evidence, nor in the records of the plaintiff company, to show the cost price of the 12,542,857 pounds of unsold copper remaining in its ownership and possession on September 20, 1917. All of the unrefined copper purchased by the plaintiff was shipped directly to the United States Refining Company of New Jersey under a contract between the plaintiff and said company, and after smelting and refining was shipped, on order of the plaintiff, by said company to plaintiff's customers. It was impossible for the plaintiff to give, from its records, the cost price of any of the different lots of copper sold by it. It may have sold copper purchased by some other dealer. It only knew how much copper it had in bulk at the refinery.

V.

After the presentation of a report by the Federal Trade Commission on the cost of the production of copper, the War Industries Board of the Council of National Defense called before it the copper producers of the country, and gave notice to the public of such meeting in order that all interests might be represented and nobody excluded. After discussion between the copper producers, represented by a committee, and the War Industries Board, a voluntary agreement was reached, with the approval of the President, a memorandum of which reads as follows:

"After investigation by the Federal Trade Commission as to the cost of producing copper, the President has approved an agreement made by the War Industries Board with the copper producers fixing a price of twenty-three and one-half cents per pound f. o. b. New

York, subject to revision after four months. Three important considerations were imposed by the board. First, that the producers would not reduce the wages now being paid, notwithstanding the reduction in the price of copper, which would involve a reduction of wages under the 'sliding scale' so long in effect in the copper mines; secondly, the operators shall sell to the Allies and the public copper at the same price paid by the Government, and will take the necessary measures, under the direction of the War Industries Board, for the distribution of the copper to prevent it from falling into the hands of speculators who might increase the price to the public; and third, the operators pledge themselves to exert every effort necessary to keep up the production of copper to the maximum of the past so long as the war lasts.

"The War Industries Board felt that the maintenance of the largest production should be assured, and that a reduction in wages should be avoided. The stipulation that the present wages shall not be reduced compels the maintenance of the highest wages ever paid in the industry, which, without such stipulation, would be reduced under the sliding scale with the reduction made in the price of copper. Within this year copper has sold as high as 36 cents per pound, and the present market price would be higher than it is had it not been well known for some weeks that the Government would fix the price.

"The principal copper producers throughout the country have evinced a most patriotic spirit, and for weeks have promptly supplied every request of the Government for copper, without awaiting decision as to price, and agreeing to accept the price which the board would ultimately fix. The proper departments of the Government will be asked to take over the mines and plants of any producers who fail to conform to the arrangement and price, if any such there should be.

"Approved by the President, September 21, 1917."

VI.

For the purpose of carrying into effect the agreement between the copper producers and the Government of September 21, 1917, a meeting of copper producers was called by the Commissioners of Raw Materials of the War Industries Board for September 28, 1917, the minutes of which read:

"A meeting of the copper producers was called at the instance of Mr. B. M. Baruch, Commissioner of Raw Materials of the War Industries Board, and was held at 120 Broadway, New York City, on Friday, September 28th, 1917, at 10.30 a. m. The following persons were present: Messrs. Joseph Clendenin, Charles Earl, S. Rosentamm, L. Vogelstein, Julius Loeb, Julian Beaty, M. H. Crego, T. Wolfson, Sidney Jennings, Charles Nichols, W. Parsons Todd, G. W. Drucker, James McDonald, and H. M. Brush. Mr. Eugene Meyer, Jr., of the Committee on Raw Material, Council of National Defense, was also present. By unanimous consent Mr. Clendenin acted as chairman and Mr. Brush as secretary of the meeting.

"Messrs. Clendenin and Wolfson reported to the meeting the result of the negotiations between the representatives of the United States Government and the representatives of the copper producers, which led to the agreement fixing the price of copper referred to in the statement made public by the President, September 21, 1917, and suggested the necessity of a committee to act for the copper producers in the premises, in view of the problems of production, distribution, consumption, and the like that would arise. Mr. Eugene Meyer, Jr., gave the meeting the benefit of his views as to the need for such a committee and an outline of what he considered would be its proper functions and authority.

"On motion duly made and seconded and unanimously adopted, a committee, to be known as 'The Copper Producers Committee,' composed of Joseph Clendenin, chairman, Tobias Wolfson, James L. McLean, and R. L. Agassiz, was chosen to act for the copper producers in carrying out the agreement made on their behalf with the War Industries Board, set forth in the statement made public by the President, September 21, 1917, to cooperate with the War Industries Board and the Commissioner of Raw Materials, in securing due performance of the agreement, and, under the direction of the War Industries Board, to take the necessary measures to that end.

"On motion duly made and seconded and unanimously adopted, Mr. H. M. Brush was chosen to act as secretary of the committee.

"It was requested that Mr. Clendenin send advice to Mr. Baruch of the action of this meeting of the copper producers.

"The representatives present were asked to submit to Mr. Brush, secretary of the Committee, prior to noon Saturday, September 29th, a statement of their estimated stock of copper on hand October 1st, together with their estimated production of copper for each month, October, November, December, 1917; January, 1918; together with a further statement covering all outstanding sales due as of October 1, 1917, for delivery prior to February 1, 1918. This information was to be assembled and submitted to a meeting of the committee to be held 11 a. m., Monday, October 1st.

"There was no objection raised to the statement that it was the sense of the meeting that all marketable copper, beginning with October 1st, should be placed at the disposal of the U. S. Government and its Allies.

"Upon the plea from Mr. Eugene Meyer, Jr., that the Government was in immediate need of about 12,000,000 lbs. copper, the producers agreed that Mr. Wolfson, secretary of the Advisory Committee, should receive instructions from the Ordnance Department to ship immediately 12,000,000 lbs. of copper, and several of the producers present agreed to receive such instructions in quantities agreed upon from Mr. Wolfson.

"It was suggested that a meeting of the principal consumers of copper should be called for Tuesday afternoon next, October 2nd.

"Upon motion duly made and seconded the meeting adjourned.

"H. M. BRUSH.

"Secretary."

The plaintiff was present at this meeting and placed in nomination the persons who were elected members of the Producers' Committee. He raised no objection at this meeting to furnishing copper at the price fixed in the agreement between the producers and the War Industries Board and approved by the President on September 21, 1917.

VII.

During the meeting on September 28, 1917, Mr. Eugene Myer, Jr., who was present at the request of the Commissioner of Raw Materials of War Industries Board, and who had with him a number of mandatory requisitions for about 12,000,000 pounds of copper, signed by the Secretary of War, and drawn up under the provisions of sections 120 and 123 of the act of June 3, 1916 (39 Stat., 213, 215), commonly known as the National Defense Act, distributed the said orders among producers and dealers present; two for 1,000,000 pounds of copper each were handed to the plaintiff. This was done at their request in order that said producers and dealers might be protected from suits for damages for breaches of their contracts with their private customers, and not because the Government intended to procure copper under such orders. The orders were all identical except as to the person addressed, and the amount of copper to be furnished. The two orders given to the plaintiff read:

War Department,
Washington, September 27, 1917.

To L. Vogelstein & Company,
42 Broadway, New York, New York:

Under the provisions of the act providing for the national defense, passed by Congress and approved June 3, 1916, and particularly under sections 120 and 123 thereof, and in the exercise of all other powers vested in the President by the Constitution and the laws of the United States, as the Chief Executive thereof and as commander in chief of the Army and Navy thereof, created or called into being by the existence of a state of actual war and by the extraordinary exigencies and requirements thereof, the President of the United States, acting through me, Newton D. Baker, Secretary of War, hereby places an order with you for the following: One million (1,000,000) lbs. prime electrolytic copper, to be 99.9% pure and not under 99.88% pure, as provided by the standards of American Society of Testing Materials.

This order shall take precedence over all other orders and contracts placed with you by any individual or individuals, firm, association, company, or corporation whatsoever, except preexisting orders of class A-1 as defined in Circular No. 1 of the Priorities Committee of the War Industries Board of the Council of National Defense, issued under date of September 21, 1917.

Delivery of the copper under this order is to be completed at any time within sixty (60) days from the date of this order, and the entire quantity is to be considered obligated and held subject to re-

ceipt of shipping instructions. Detailed shipping instructions affecting all of this material, or partial amounts aggregating the total involved, will be prepared and issued by the Gun Division, Ordnance Department, whose instructions you are to honor.

The price to be paid for this material, in accordance with the adoption of a fixed price for copper by the President of the United States, shall be twenty-three and one-half ($23\frac{1}{2}$ c) cents per lb. f. o. b. New York basis.

Shipments will be made on Government bills of lading. To facilitate prompt payment of invoice it is desirable that deductions for freight allowance shall be made from the face of the invoice.

The copper to be delivered under this order will be paid for by the Ordnance Department after inspection at the receiving point. Invoices and correspondence regarding this order should be addressed "Gun Division, Office of the Chief of Ordnance, 1330 F Street, Washington, D. C."

Yours truly,

NEWTON D. BAKER,

Secretary of War.

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VIII.

It was understood and agreed between the producers and dealers in copper (including the plaintiff) and the United States that no copper would be required by the United States under the mandatory orders referred to in Finding No. VII, but that the 12,000,000 pounds of copper named in said requisitions would be obtained in the usual way through the contracts between the United States and the United Metals Selling Company, which were entered into from time to time, beginning with April 6, 1917, in the following form:

These articles of agreement entered into the 1st day of November, 1917, by and between the United Metals Selling Company, a corporation organized and existing under and by virtue of the laws of the State of Delaware, and having its general office at No. 42 Broadway, New York, N. Y., the party of the first part (hereinafter called the contractor), and the United States of America, by Jay E. Hoffer, colonel, Ordnance Department, United States Army (hereinafter called the contracting officer), acting by and under the authority of the Chief of Ordnance, United States Army, and under the direction of the Secretary of War, of the second part:

Witnesseth, whereas a state of war exists between the United States of America and the Imperial German Government, constituting a national emergency.

Now, therefore, under the provisions of section 120 of an act of Congress relating to national defense, approved June 3, 1916, and pursuant to all other laws of the United States and Executive orders of the President of the United States, or head of its departments under which the requirements of advertisements for proposals are dispensed with, and contracts in the form hereof duly authorized, and in consideration of the mutual agreements herein contained,

the said parties have agreed and by these presents do agree to and with each other as follows, viz:

Copper.—Article I. The contractor agrees to make and deliver to the United States 65,000,000 pounds, more or less, of electrolytically refined copper, or, at its option, Prime Lake copper, 99.9 per cent pure, and in any event either Prime Lake copper or electrolytic copper is to be not less than 99.88 per cent pure, in accordance with the standards of the American Society for Testing Materials. The United States agrees to pay for the copper herein contracted for, all upon the terms and conditions in this contract set forth.

Deliveries.—Article II. The contractor agrees to deliver to the United States the copper herein contracted for on cars or on lighters at or near plants represented by the contractor, deliveries to begin on or before November 1, 1917, in accordance with shipping instructions of the contracting officer, and to be completed on or before January 20, 1918. Such deliveries will be f. o. b. cars and on lighters at or near plants, providing such plants are on the Atlantic or Pacific seaboard. Should the copper be shipped from refineries in the interior of the United States, such as from Great Falls, Mont., or the Lake plants in Michigan, the contractor will pay the carload lot freight rate prevailing at the time of shipment from such plant to New York, N. Y. Should the contractor be required to make delivery by lighter, the United States will pay for such light-
20 erage service at the prevailing market rates. The contractor agrees to make shipments from such plants as will be most advantageous to the Government's interests, both in the matter of freight and time required for delivery.

The contractor shall deliver the copper herein contracted for to the United States in regular commercial shapes, such as ingot cakes, wire bars, and ingot bars, in accordance with the schedules of the several refineries. Should billets or other extra heavy cakes be called for or be required by the United States, the contractor will be paid the extra charge applying thereto in the particular plant furnishing copper in such shapes.

Time being of the essence, the contractor undertakes to increase the production to such a maximum rate as facilitates and equipment permit.

The performance of this contract shall have precedence over all work for parties other than the United States. The contractor shall from time to time, and whenever requested so to do by the contracting officer, furnish to the contracting officer statements and reports on the progress of the work and any factors bearing on deliveries.

Delays Not Due to Contractor's Fault.—The contractor will not be held responsible for delays in delivery due to the delay of the United States in inspecting, or by other delays due to causes beyond the control and without the fault of the contractor, but, simultaneously with the removal of such causes for delay, the contractor shall proceed with the performance of this contract, due allowance for such delay having been made. The contractor agrees, in view of the

emergency necessitating this contract, to use its best endeavors to remove such cause for delay.

Contractor Will Mark and Ship the Copper.—The contractor at its own expense shall suitably mark the copper and load the same on cars or on lighters, and at the cost of the United States after delivery shall ship the copper to any point in the United States, making all arrangements for transportation, all according to the instructions of the contracting officer.

Purchase Price.—Article III. The sum of \$0.235 f. o. b. cars New York basis, hereby fixed as the purchase price of each pound in weight of the copper, delivered and accepted, will be paid by the United States to the contractor as follows:

Payments.—(1). Upon the certificate of the inspecting and receiving officer, showing delivery and acceptance, the United States will pay the sum of \$0.235 for each pound in weight of the copper delivered and accepted as soon as practicable after such certification.

Prompt Payments.—To facilitate prompt payments the United States may attach a disbursing officer to the main office or plant of the contractor. No payments by the United States shall act to prevent the United States from later disputing the validity thereof under this contract.

Inspection.—Article IV. All materials furnished under this contract, the plant, machinery, tools, and equipment, all workmanship and the copper shall be at all times subject to inspection by the officers or agents of the Ordnance Department or persons designated by the Chief of Ordnance or the contracting officer, and the contractor shall furnish reasonable facilities and assistance for all such inspection, and whatever of the copper does not in all respects fulfill the requirements of the contract shall be rejected.

Should any disputes arise as to the copper delivered being in accordance with specifications, a sample of the copper shall be submitted for analysis to Ledoux & Co., or to Dr. Lucius Pitkin, for determination of the analysis. If they are unable to act, an umpire mutually agreeable to the United States and the contractor shall act, or the contractor and the United States shall request the president of the Chamber of Commerce of New York City to name a chemist or metallurgist of recognized standing to act as such umpire. The fees and expenses involved in such analysis shall be paid by the party in error. Should there be a default in the quality of the copper received, the contractor shall bear the expenses of shipment to and from the point of delivery.

At the option of the contracting officer, inspection of the copper at the mill of the contractor may be waived.

The contractor agrees to immediately replace, without cost to the United States, all copper so rejected. The contracting officer may withhold out of payments to be made hereunder on any account an amount sufficient to cover the cost thereof until proper replacement of rejected copper.

Material, etc., to be Kept Unincumbered.—Article V. The contractor hereby, for the consideration named, waives and releases all

lien or right of lien now existing or that may hereafter arise for work or labor performed or materials furnished or for any other reason or cause under this contract, under any lien laws, State or Federal, upon any material, supplies, and the like coming into its possession which it is herein contemplated shall presently or ultimately become the property of the United States; and the contractor agrees not to create or suffer to be created any mortgage, lien, pledge, attachment, or other incumbrances upon any such materials, supplies, or other property in its possession, and in the event that such mortgage, pledge, lien, attachment, or incumbrance is created the contractor agrees to pay and discharge or, if it disputes the validity of the claim out of which such incumbrance arises, immediately to bond the same to the end that all property shall at all times be and remain free from all incumbrance.

This Contract Not Assignable.—Article VI. This contract shall not, nor shall any right to receive payment or any other interest therein, be transferred or assigned by the contractor to any person, firm, or corporation without the consent of the Secretary of War.

The contractor shall make all subcontracts, purchases, payments, and arrangements for performing this contract in its own name and for its own account, and shall not bind or purport to bind the United States except as the contracting officer shall otherwise direct in writing.

Subcontracts Must Be Assignable and Refer to This Contract.—The contractor shall, unless otherwise directed by the contracting officer, insert in every contract hereafter made for increased facilities, component parts, labor, material, supplies, and the like or otherwise relating to the performance of this contract, a provision
22 that such contract may be assigned by the contractor and that it relates to a "main contract" between the contractor and the United States.

Labor Disputes.—Article VII. In the event that labor disputes shall arise directly affecting the performance of this contract and causing or likely to cause delay in making the deliveries upon the date or dates specified the contractor shall address a written statement thereof to the Chief of Ordnance for transmission to the Secretary of War with the request that such dispute be settled, providing such information and access to information within the control of the contractor as the Secretary of War shall require, and it is stipulated and agreed that the Secretary of War may thereupon settle or cause to be settled such dispute, and the contractor agrees to accede and comply with all the terms of such settlement. If the contractor is thereby required to pay labor costs higher than those then prevailing in the performance of this contract prior to such settlement, a fair addition to the contract price of the article shall be made therefor; but if such settlement reduces the labor costs of the contractor, a fair deduction shall be made from the contract price, all as may be determined by the contracting officer. No claim for addition or deduction shall be made unless the same has been ordered in writing.

Officials Not to Benefit.—Article VIII. No Member of or Delegate to Congress or Resident Commissioner, nor any person belonging to or employed in the military service of the United States is or shall be admitted to any share or part of this contract, or to any benefit that may arise therefrom; but this article shall not apply to this contract so far as it may be within the operation or exception of section 116 of the act of Congress approved March 4, 1909 (35 Stats., 1109).

Prison Labor.—Article IX. No person or persons shall be employed in the performance of this contract who are undergoing sentences of imprisonment at hard labor which have been imposed by the courts of the several States, Territories, or municipalities having criminal jurisdiction.

Disputes to be Referred to Chief of Ordnance.—Article X. Except as this contract shall otherwise provide any doubts or disputes which may arise as to the meaning of anything in this contract shall be referred to the Chief of Ordnance for determination. If, however, the contractor shall feel aggrieved at any decision of the Chief of Ordnance upon such reference, it shall have the right to submit the same to the Secretary of War, whose decision shall be final.

Notice.—Article XI. Notice under this contract when not actually given to the contractor shall be deemed to have been sufficiently given to and received by the contractor, when mailed in a sealed postpaid wrapper addressed to the United Metals Selling Co., 42 Broadway, New York, N. Y.

"Contracting Officer" Defined.—Article XII. This contract may be executed in any number of counterparts, all of which together shall constitute one original contract. Wherever the term "Contracting officer" is used in this contract the same shall be construed to mean his successor or successors, his duly authorized agent or agents, or anyone designated by the Chief of Ordnance, from time to time, to act as contracting officer.

23 In witness whereof, the parties hereto have caused this contract to be executed under their seals (in sextuplicate) by their respective officers, duly authorized the day and year first above written.

Signatures:

[SEAL.]

UNITED METALS SELLING COMPANY, *Contractor.*

T. M. WOLFSON, *Vice Pres.*

UNITED STATES OF AMERICA,

By JAY E. HOFFER,

Colonel, Ordnance Department, U. S. Army.

Contracting Officer.

By CHAS. N. BLACK,

Lieut. Colonel, Ordnance Department, N. A.

Witnesses:

C. W. WELCH, *Secretary.*

W. S. CLARKE.

IX.

The plan adopted for obtaining the copper by the Government was for the War or Navy Department to send an order to the United Metals Selling Company directing it to ship a certain number of pounds of copper to some specified party on bills of lading forwarded with the order. This order was sent to the Producers' Committee, which returned it to the United Metals Selling Company with the name of the producer or dealer on whom the order should be made endorsed thereon. Thereupon the United Metals Selling Company placed its own order with the producer or dealer named by the Producers' Committee, requesting that it "please ship" a certain number of pounds of copper to a designated party at a certain time on the attached bill of lading, giving the numbers of the same, and also the number of the contract with the Government against which the order was issued, and stating the price to be paid as $23\frac{1}{2}$ cents per pound. No order was placed with the United Metals Selling Company by the Government unless there was a contract with the company against which it could be charged. Sometimes an order would be sent in advance of the contract, but the contract would always follow. Each order was identified with a specific contract.

X.

The first contract entered into between the United States and the United Metals Selling Company was dated April 6, 1917, and called for the delivery of 20,000,000 pounds of copper, at 16.6739 cents per pound. The succeeding contracts were those of April 21, 1917, for 25,100,000 pounds, at 16.6739 cents per pound; July 21, 1917, for 7,733,389 pounds at $23\frac{1}{2}$ cents per pound; October 15, 1917, for 11,593,345 pounds at $23\frac{1}{2}$ cents per pound; October 26, 1917, for 15,500,000 pounds at $23\frac{1}{2}$ cents per pound; November 1, 1917, for 65,000,000 pounds, at $23\frac{1}{2}$ cents per pound; January 20, 1918, for 100,000,000 pounds at $23\frac{1}{2}$ cents per pound; February 1, 1918, for 50,000,000 pounds at $23\frac{1}{2}$ cents per pound; March 20, 1918, for 50,000,000 pounds, at $23\frac{1}{2}$ cents per pound.

The total number of pounds of copper the said company agreed to deliver to the United States was 343,336,734. The number of pounds delivered by the said company in accordance with the procedure set out in Finding No. IX, from September 21, 1917, to February 1, 1918, the period during which the copper out of which this suit arose was delivered, was in round numbers 283,000,000 pounds.

XI.

Orders were placed by the United Metals Selling Company with the plaintiff in accordance with the procedure described in Finding No. IX at various times between September 21, 1917, and February 1, 1918, for different amounts of coppers. The plaintiff thereupon issued its orders to the United States Metals Refining Company to ship the copper as requested by the order of the United Metals Sell-

ing Company on the bills of lading furnished with said order. During the period from September 21, 1917, to February 1, 1918, the plaintiff shipped through the said refining company to the parties named by said Selling Company in its orders, among other copper, the 12,542,857 pounds which remained unsold in its possession and ownership as described in Finding No. 11, and received therefor from the said United Metals Selling Company compensation at the rate of 23½ cents per pound. The difference between the cost of said 12,542,857 pounds of copper at 26.881977 cents per pound, the rate at which the whole mass of copper, 43,851,042 pounds, on hand September 20, 1917, was purchased, and at 23.5 cents per pound, the rate at which the said 12,542,857 pounds of copper were sold to the United Metals Selling Company by plaintiff, was \$424,196.54. There were shipped by plaintiff during the same period on one of the same orders as the 12,542,857 pounds, 458,803 pounds to the United Metals Selling Company, concerning which no claim is made, because it was copper purchased at 23½ cents per pound, and there was no loss.

XII.

The United Metals Selling Company at the time of the transactions complained of in the plaintiff's petition was a corporation duly incorporated and existing under the laws of the State of Delaware and having its general office at No. 42 Broadway, New York City. The powers of the company under its charter were broad. It was authorized to mine, buy, sell, and deal in copper and other materials. The company, however, in its business confined itself almost exclusively to acting as sales agent for copper-producing companies.

XIII.

The Council of National Defense was created by section 2 of the act of August 29, 1916 (39 Stat., 649, 650) "for the coordination of industries and resources for the national security and welfare," and its organization was completed March 3, 1917. It consisted of the Secretaries of War, Navy, Interior, Agriculture, Commerce, and Labor. It had very extensive powers, among which was authority to organize subordinate bodies for its assistance in special investigations, and in pursuance thereof, by resolution of March 31, 1917, it organized the General Munitions Board, by one clause of which it provided that "such committee shall have no authority at this time to issue purchase orders, make contracts, or bind the Government in the purchases; all these things to be done as at present by the respective departments." By resolution of July 28, 1917, the council organized the War Industries Board to supersede and take the place of the General Munitions Board.

XIV.

The evidence fails to show that either the Council of National Defense or the War Industries Board ever placed, or attempted to

place, any mandatory orders under the act of June 3, 1916, with the plaintiff, or ever entered into, or attempted to enter into, any contracts with the plaintiff to obtain copper or any other metal.

Conclusion of Law.

Upon the foregoing findings of fact the court decides, as a conclusion of law, that the plaintiff is not entitled to recover, and its petition is therefore dismissed.

Judgment is rendered against the plaintiff in favor of the United States for the cost of printing the record in this cause, the amount thereof to be entered by the clerk and collected by him according to law.

V. *Judgment of the Court.*

At a Court of Claims held in the City of Washington on the Thirteenth day of June, A. D., 1921, judgment was ordered to be entered as follows:

The Court, upon due consideration of the premises find in favor of the defendant, and do order, adjudge and decree that L. Vogelstein and Company, as aforesaid, is not entitled to recover and shall not have and recover any sum in this action of and from the United States; and that the petition herein be and the same hereby is dismissed: And it is further ordered, adjudged and decreed that the United States shall have and recover of and from L. Vogelstein and Company, as aforesaid, the sum of One thousand six hundred and ninety dollars and thirty-three cents (\$1,690.33), the cost of printing the record in this court, to be collected by the Clerk, as provided by law.

By THE COURT.

VI. *Proceedings After Entry of Judgment.*

On August 11, 1921, the plaintiff filed a motion for a new trial and to amend findings.

On October 10, 1921, the Court overruled said motion.

On October 20, 1921, the plaintiff filed exceptions to overruling of its motion for a new trial.

On November 18, 1921, defendant filed a motion to strike from the files plaintiff's exceptions to overruling its motion for a new trial.

On January 3, 1922, the Court filed an order striking said exceptions from the files.

On January 3, 1922, plaintiff filed an application for appeal.

On January 4, 1922, the plaintiff filed a motion for direction as to the record on appeal, which was submitted in open court.

On January 4, 1922, the plaintiff's application for appeal (filed January 3, 1922) was submitted in open court.

28. On January 7, 1922, at the request of the attorneys of record Messrs. McKenney & Flannery were entered as of counsel.

VII. *Order of Court on Plaintiff's Motion for a Direction as to the Record on Appeal.* Entered Jan. 9, 1922.

In this case it is ordered that the Clerk in making up the record on appeal to the Supreme Court shall observe the rules of the Supreme Court with reference to appeals from this Court. This order is made as a ruling upon plaintiff's motion for a direction as to the record on appeal, filed January 4, 1922.

Jan. 9, 1922.

By THE COURT.

29. VIII. *Plaintiff's Application for and the Allowance of an Appeal.*

Now comes L. Vogelstein & Company, Inc., the claimant herein and above named, by its attorneys of record, Messrs. Reeves & Todd, and prays the allowance by this Honorable Court of an appeal to the Supreme Court of the United States from the judgment entered herein on the 13th day of June, A. D. 1921;

And also from the Order of this Honorable Court entered herein on the 10th day of October, A. D. 1921, denying said claimant's motion to amend the findings of fact filed herein on June 13, 1921, to make additional findings of fact, and for a new trial on errors both of fact and of law as in said motion specified;

And also from the Order of this Honorable Court entered herein on the 3rd day of January, A. D. 1922, directing claimant's exceptions to the overruling of its motion for a new trial, and for amended and additional findings of fact, to be stricken from the files of this Court.

L. VOGELSTEIN & COMPANY,
INC.,

By REEVES & TODD,

Its Attorneys of Record.

McKENNEY & FLANNERY,

Of Counsel.

Filed January 3, 1922.

Ordered: That the above application for appeal be allowed as to the first and second paragraphs.

January 9, 1922.

By THE COURT.

Court of Claims.

No. 33974.

L. VOGELSTEIN & CO., INC.,

VS.

THE UNITED STATES.

I, F. C. Kleinschmidt, Assistant Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the argument and submission of case; of the findings of fact, conclusion of law; of the judgment of the court; of the proceedings after the entry of judgment; of the order of the court on motion as to a direction as to record on appeal; of the plaintiff's application for appeal and allowance of same.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Washington City this Twenty-fourth day of January, A. D., 1922.

[Seal of the Court of Claims.]

F. C. KLEINSCHMIDT,
Assistant Clerk Court of Claims.

Endorsed on cover: File No. 28,702. Court of Claims. Term No. 747. L. Vogelstein & Company, Inc., appellant, vs. The United States. Filed February 9th, 1922. File No. 28,702.

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Supreme Court of the United States

L. VOGELSTEIN & COMPANY, INC.,
Appellant,
vs.

THE UNITED STATES.

No. 269.

Appeal from the Court of Claims.

BRIEF FOR APPELLANT.

This is an appeal by claimant from a judgment dismissing its petition on the merits, after argument and submission of the case on the proofs. The Court below based its decision upon the Findings of Fact, without rendering an opinion (Transcript of Record, pp. 7-19).

Claimant brought this suit to recover fair and just compensation for 12,542,857 pounds of copper, taken from it by the United States for war purposes. The issues are whether or not the United States ordered and took this copper, and compelled claimant to deliver it, and whether or not claimant is entitled to recover the difference between the amount received from the United States and the actual cost to claimant of said copper.

Statement of Case.

In 1917 and 1918, claimant, a New York corporation was a dealer in metals. It was not a mine owner, producer or refiner, but restricted its activities to buying, refining and selling (Finding II, R. p. 7). At the close of business on September 20, 1917, it had on hand 43,851,042 pounds of copper, which had cost it \$11,798,027, making, the average cost thereof per pound 26.881977 cents. Of this amount of copper, 31,308,183 pounds had been sold for future delivery, and there remained unsold and in the ownership of claimant 12,542,857 pounds. This was all bulk copper at the refinery (Findings III, IV, R. p. 8).

On September 21, 1917, the price of copper was fixed by announcement of the President of the United States, after conference with the producers of copper (of whom claimant was not one), at 23½ cents per pound (Finding V, R. pp. 8, 9; Finding VII, R. p. 12). Thereafter on September 28, 1917, a meeting was called in New York City of the copper producers and dealers of the country, at which claimant was represented and at which a Copper Producers' Committee was formed. That Committee was created to co-operate with the War Industries Board and the Council of National Defense, by allocating orders from the United States for copper to the various producers and dealers who were to be called on to supply it for war purposes (Finding VI, R. pp. 9-11). Eugene Meyer, Jr., was there present as a representative of the United States, and had with him a number of commandeering orders for copper, signed by the Secretary of War and drawn up under the provisions *inter alia* of §§ 120 and 123 of the National Defense Act of June 3, 1916. Two of these, for 1,000,000 pounds of copper each, he handed to the claimant (Finding VII, R.

p. 11). It was arranged that the copper named in said requisitions would be obtained in the usual way through contracts between the United States and the United Metals Selling Company, which were entered into from time to time beginning April 6, 1917 (Finding VII, R. p. 11; Finding VIII, R. p. 12). The United Metals Selling Company "in its business confined itself almost exclusively to acting as sales agent for copper-producing companies" (Finding XII, R. p. 18).

At said meeting, it was made clear that the United States was controlling all the copper in the country and would compel delivery thereof for war purposes as required; and in a public document, written and submitted to the President of the United States at his request by Bernard M. Baruch, chairman of the War Industries Board, the control of all copper by the Government at that time and during the war is described. The Court of Claims did not make any finding as to such control of copper. The uncontradicted evidence of that control, including the pertinent portions of Mr. Baruch's report, is contained in the papers on claimant's motion to remand for further findings which has been reserved by this Court for consideration in connection with the whole case on the merits (Findings VI, VII, R. pp. 10, 12; Motion to Remand, pp. 1-5, 36-40, 64-74).

The copper demanded by said two commandeering orders was actually furnished by claimant to the United States (and used by it for war purposes), through the intermediary services of the United Metals Selling Company and according to the Government's plan of acquiring copper for the War and Navy Departments. In the carrying out of that plan, the agencies employed by the United States, in addition to its War and Navy Depart-

ments, were the Council of National Defense, and its subordinate body the War Industries Board, said Copper Producers' Committee, and the United Metals Selling Company. (Findings V-VII, IX, R. pp. 8-10, 17.)

Express contracts were made between the United States and the United Metals Selling Company, and the orders for copper were sent directly to that company by the War or Navy Department. Each such order was handed to the Copper Producers' Committee, which returned it with the name of the producer or dealer, on whom the order should be made, endorsed thereon. Thereupon the United Metals Selling Company placed its own order with the producer or dealer named by said Committee, requesting it to 'please ship' a certain number of pounds of copper to a designated party, on attached Government bills of lading, giving the numbers of such bills, and also the number of the contract with the Government against which the order was issued, and stating the price to be 23½ cents per pound (Findings, VIII-XIII, R. pp. 12-18).

In accordance with this plan of procurement claimant supplied, between September 21, 1917, and February 1, 1918, to the United States for war purposes, the 12,542,857 pounds of copper which cost it 26.881977 cents per pound (Finding XI, R. pp. 17, 18). For all of this copper claimant received from the United States, through the United Metals Selling Company, 23½ cents per pound; and its present claim is that it should recover the difference between the amount thus received and the actual cost to it of the copper, namely, \$424,196.54 (R. pp. 5, 18).

Claimant did not object to complying with the requirements of the United States after September 21, 1917, as

to the method of furnishing copper through the agency of the United Metals Selling Company; and at said meeting on September 28, 1917, it did not object to the price fixed by the Government (Finding VI, R. p. 11). It does not appear that such price or any price was mentioned at that meeting. Claimant did protest, however, against receiving no more than $23\frac{1}{2}$ cents per pound for the 12,542,857 pounds, which had necessarily cost it 26.881977 cents per pound and which had been purchased under compelling long-term contracts. As to these protests there are no findings, although clear evidence of them below is uncontradicted. (Motion, pp. 3, 4; 54-64.) As to such facts claimant, before the announcement of the judgment of the Court of Claims, made requests for specific findings of fact by that Court substantially in the form set forth in the pending motion to remand at pp. 3, 4, 54-64, and reiterated the same, not only in its motion for a rehearing, but also in its filed exceptions to the order of that Court overruling such motion.

May the facts set forth in those motion papers, especially as summarized at pp. 1-5 thereof, be treated as a part of this statement. They show:—

That claimant was compelled to hand over the 12,542,857 pounds of copper to or for the United States;

That claimant protested against receiving only $23\frac{1}{2}$ cents per pound for that copper;

That claimant unavoidably had that quantity on hand at the necessary cost to itself of 26.881977 cents per pound on the 21st day of September, 1917, when the price of copper was fixed by the Government.

Since that average cost price was manifestly higher

than the price which the Government would fix, claimant's vendors under the controlling long-term contracts forced it to take copper rapidly and so to have on hand and unsold the 12,542,857 pounds. Claimant insists that it would not have been put in this position but for the imminence of the governmental fixing of price. It could have avoided this result if it had been a producer. It was the only large dealer who was compelled thus to take rapidly and was unable to sell as fast. Its position was and is unique.

Claimant is compelled to insist here that the findings as contained in the Transcript of Record may lead to erroneous conclusions, and that claimant is fairly entitled to the additional findings requested in said motion.

It is respectfully submitted that the judgment below should be reversed *even on the findings already made*, and that this certainly should be done with the aid of the additional findings sought by the motion.

Assignments of Error.

Appellant says that the Court of Claims made the following errors:—

1. In deciding, as a Conclusion of Law, that claimant is not entitled to recovery, and that its petition should be dismissed.
2. In refusing to make additional findings of fact as to matters indicated in claimant's motion to remand.
3. In finding as a fact that "after September 20, 1917, the market price of copper was 23½ cents per pound".

ARGUMENT.

I.

Claimant did not make any express contract for the sale of the 12,542,857 pounds of copper, for fair and just compensation for which this action is brought.

The recovery in this action must be based on an *implied* contract—between claimant and the United States.

U. S. Judicial Code, §145;

United States v. North American Co., 253 U. S. 330.

No express contract made by claimant is either pleaded or found. If such a contract could possibly exist, it would have to be between claimant and either (1) the United States, or (2) the United Metals Selling Company.

(1)

There was no express contract between claimant and the United States.

Not only is no such express contract pleaded, or found, but Findings of Fact VIII-XI (R. pp. 12-18) show that none could have existed.

“During the period from September 21, 1917, to February 1, 1918, the plaintiff shipped through the said Refining Company to the parties named by said Selling Company in its orders, among other copper the 12,542,857 pounds which remained unsold in its possession and ownership as described in Finding No. II.” (Finding “XI”, R. top p. 18.)

Claimant's insistence is that this procedure occurred in the execution of an *implied* contract between it and the

Government. This Finding simply describes the culmination of the procedure, and nullifies the possibility of any *express* contract between claimant and the United States.

(2)

There was no express contract between claimant and the United Metals Selling Company.

No such contract is pleaded; none is found. The only express contracts were between the Government and the United Metals Selling Company; and all subcontracts made by the latter were required to have inserted in them a statement "that it relates to a 'main contract' between the contractor and the United States" (Finding VIII, R. middle of p. 15). No such subcontract was ever made with respect to the copper acquired from claimant. The procedure, so far as the United Metals Selling Company was concerned, was as follows (Findings IX, XI)—order for copper for War or Navy Department placed by United Metals Selling Company with claimant; then order issued by claimant to the United States Metals Refining Company (claimant's refinery) to ship the copper thus ordered; *Government* bills of lading sent with both orders; the required copper shipped by United States Metals Refining Company on those bills of lading; receipt by claimant from United Metals Selling Company of 23½ cents per pound.

That procedure did not constitute nor show an *express* contract for copper.

In the absence of any *express* contract by or with claimant, the case at bar is distinguished from the recent cases, in which this Court has held the claimant to be precluded from recovery by an express agreement as to compensation, such as

American Smelting & Refining Co. v. United States, 258 U. S.—; No. 221 October Term 1921, decided May 15, 1922;

Duesenberg Motors Corporation v. The United States, 259 U. S.—; No. 80 October Term 1922, decided November 13, 1922.

When the United States ordered and took claimant's copper for war purposes, it impliedly promised and contracted to make fair and just compensation,—not only "just" compensation, which is the wording of the Fifth Amendment of the Constitution, but also fair compensation, in full satisfaction of claimant's loss. When Section 120 of the National Defense Act was passed, with its plenary powers for immediate governmental acquisition of property for war purposes, it was manifestly intended to go beyond the constructions already put on the word "just" as found in the Constitution, and to provide that in the broadest and most equitable sense he whose property was taken should be fairly and fully, as well as justly, compensated.

U. S. Judicial Code, § 145;

United States v. North American Co., 253 U. S. 330, 333;

Tempel v. United States, 248 U. S. 121, 129;

United States v. Lynah, 188 U. S. 445, 462;

United States v. Great Falls Manufacturing Company, 112 U. S. 645, 658;

Langford v. United States, 101 U. S. 341.

II.

The commandeering orders handed to claimant on the 28th day of September, 1917, were and remained mandatory.

Those two commandeering orders, each for 1,000,000 pounds, one of which is quoted in the record (R. pp. 11, 12), specifically provide that the President "hereby places an order with you", not only in the exercise of all the powers that he has to do so, but especially "under the provisions of the Act providing for the National Defense passed by Congress and approved June 3, 1916, and particularly under Sections 120 and 123 thereof". Such language *must* mean, unless very clearly explained to the contrary, that the Government was taking absolute control of 2,000,000 pounds of claimant's copper under and pursuant to the National Defense Act.

Outside of the explicit language of those orders, there are only two statements in the Findings concerning them (Finding VII, R. p. 11; Finding VIII, R. p. 12). In the first of these, after it is found that Eugene Meyer, Jr., was present at the meeting of September 28, 1917, at the request of the Commissioner of Raw Materials of the War Industries Board, and had with him such orders for 12,000,000 pounds of copper drawn up under the provisions of §§ 120 and 123 of the National Defense Act, which orders he distributed among the producers and *dealers* present, two for 1,000,000 pounds each to the claimant, the following sentence appears:—

"This was done at their request in order that said producers and dealers might be protected from suits for damages for breaches of their contracts with their private customers, and not because the

Government intended to procure copper under such orders" (Finding VII, R. p. 11).

The other of those two statements (Finding VIII, R. p. 12) reads:—

"It was understood and agreed between the producers and dealers in copper (including the plaintiff) and the United States that no copper would be required by the United States under the mandatory orders referred to in Finding No. VII, but that the 12,000,000 pounds of copper named in said requisitions would be obtained in the usual way through the contracts between the United States and the United Metals Selling Company, which were entered into from time to time, beginning with April 6, 1917."

Three conclusions become clear from a consideration of these statements, viz.;

(1) It is not found that the producers or dealers present at the meeting of September 28, 1917, ever requested or consented to the making of those orders, or asked Mr. Meyer to bring them to the meeting with him, or had anything whatever to do with their issuance by the Secretary of War before they were found at that meeting; but, finding them there in the form of absolute commands, together with the Government's insistence that all their copper must be held at its disposal (Motion, pp. 65-69), they then requested delivery of those orders to themselves, to the end that the mandates which were coming to them in any event might be used as protection when needed against their private customers.

Those orders could afford no such protection unless they were and remained commands from the Government. If as such commands they did not require claimant to

supply the copper to the Government in priority over all other contracts or claims, that fact could be shown by the private customers and recovery be had by them for consequent breach of their contracts with claimant.

Mawhinney v. Millbrook Woolen Mills, Inc., 234 N. Y. 244, 250;

Roxford Knitting Co. v. Moore & Tierney, 265 Fed. Rep. 177; s. c. 253 U. S. 498.

Moreover, it was only the *obtaining* of the copper—the method of actually getting it as thus commandeered—that was put through the United Metals Selling Company—it “would be obtained in the usual way through the contracts between the United States and the United Metals Selling Company, which were entered into from time to time, beginning with April 6, 1917”—the system of working out the *delivery* had thus been inaugurated nearly six months before the meeting of September 28, 1917, and was being perfected at that meeting; but the absolute requirement and mandate that, by that system, the copper must pass from claimant to the United States was left untouched by such an arrangement, and was manifested by the commandeering orders which thus also became effective against the private customers of the producers and dealers.

(2) It must have been intended that those commandeering orders should have and retain mandatory force; else the Government of the United States would have been colluding with these producers and dealers to defraud their private customers who had contracts with them for copper. If those two orders handed to claimant were nothing but forms, or were intended to become

nothing but forms, then they were also nothing but *shams*. They must have the effect of holding the 2,000,000 pounds of copper legally and conclusively away from the private customers and for the Government, or they must be used falsely and fraudulently to give that appearance. It is, of course, inconceivable that the Government of the United States could intend them to have the latter effect, or that Mr. Meyer taking them to the meeting as the Government's representative could intend that they should have that effect. It is a

“very general and very proper understanding that the Government will never knowingly do wrong and injustice to any of its citizens.”

United States v. Raine-Andrews Lumber Co.,
262 Fed. Rep. 787, 801.

(3) The intention, as shown by Mr. Meyer himself, was that those commandeering orders should be mandatory—that, however the *delivery* of the copper might be worked out, they should stand as governmental commands unless some other arrangement was subsequently made. He testified as follows (Motion, pp. 64, 65):—

“71. Cross-question. As a layman Mr. Meyer, doesn't it occur to you that if there were no commandeering orders from the Government they could not and would not have that effect?

Answer. They were commandeering orders from the Government; there was no doubt as to their status; they would not have any effect at all if they were not commandeering orders. I never questioned those orders being commandeering orders. The orders were commandeering orders.

72. Cross-question. And they were orders which the persons to whom they were delivered would have

to obey unless some other arrangement was made?

Answer. Or unless some other understanding was entered into, or unless they were waived by the departments."

Thus those commandeering orders were essentially mandates. They were part and parcel of the Governmental control of all copper, whereby claimant was *compelled* to transfer and deliver to the United States the 12,542,857 pounds in question.

III.

The President and Government of the United States placed orders with claimant for the 12,542,857 pounds of copper, for fair and just compensation for which this action is brought.

The facts found by the Court below show this clearly. It would be confirmed and emphasized by a finding that claimant was *compelled* to deliver that copper to the United States. How the facts found show it may appear from a brief discussion of three propositions, viz.: (1) the commandeering orders outlined the method of controlling all copper, and acquiring it as far as necessary, by or for the United States, (2) the contracts with the United Metals Selling Company and their execution, through which the United States acquired essentially all of its copper during the war, show that such orders must have been so placed with the claimant, and (3) the agencies and procedure through which the United States acquired the copper point unmistakably to the placing of such orders.

(1)

It is shown by the Findings that the commandeering orders handed to claimant at the meeting of copper producers and dealers on September 28, 1917, not only had and retained the effect of absolute mandates, but also prepared the way for and outlined the method and procedure whereby the United States acquired its copper during the war.

Those commandeering orders were "signed by the Secretary of War and drawn up under the provisions of §§ 120 and 123 of the Act of June 3, 1916 (39 Stat., 213, 215), commonly known as the National Defense Act"; and they took precedence over all other orders and contracts (Finding VII, R. p. 11).

Logically and naturally, those commandeering orders in their own language indicated a method for their own fulfillment, viz.:

"Detailed shipping instructions affecting all of this material, or partial amounts aggregating the total involved, will be prepared and issued by the Gun Division, Ordnance Department, whose instructions you are to honor" (Finding VII, R. top p. 12).

In practice, those orders were issued in the usual way through the intervention of the United Metals Selling Company, and this method of procedure was followed when orders thereafter came to claimant. The only modification thereof which really occurred came about by the claimant's yielding, as a loyal citizen, to the urgent request of the Government's representative (Findings V-VII, R. pp. 8-12). That modification *in method* is described in the motion to remand (pp. 63-65), and cul-

minated as to claimant by its writing the following letter (Motion, p. 64):

"October 16, 1917.

Gun Division, Office of the Chief of Ordnance,
1330 F Street, Washington, D. C.

Dear Sirs: Referring to orders No. War-Ord-G, 574-312-S and No. War-Ord-G-575-313-S each of one million pounds of copper, dated September 27th, 1917, we are writing you upon request of the Copper Producers Committee that in view of the fact that we have received our shipping instructions from the United Metals Selling Co., and are going to bill the copper to them, we do not see any objection to your making the contract for the entire poundage, including our 2,000,000 lbs. with the United Metals Selling Co.

Yours, very truly,

L. VOGELSTEIN & Co., Inc."

We read further in those commandeering orders, "shipments will be made on Government bills of lading". Every shipment of copper made by claimant—in the procedure outlined by Finding IX (R. p. 17)—was on a Government bill of lading "forwarded with the order" sent by the Government to the United Metals Selling Company.

And finally the commandeering orders provide (R. p. 12):

"Invoices and correspondence regarding this order should be addressed 'Gun Division, Office of the Chief of Ordnance, 1330 F Street, Washington, D. C.'".

Such is the address of claimant's letter last above-quoted—manifestly written merely to adjust *procedure* in essentially obeying the orders placed with it by the

United States pursuant to §§120 and 123 of the National Defense Act.

Thus the very commandeering orders themselves indicated "the plan adopted for obtaining the copper by the Government" (Finding IX). Such orders, not being *intended* to be enforced except through that plan, were no longer essential after that plan itself, *with the compulsion of the United States back of it*, was perfected. The orders themselves were *indicia* of the governmental force back of that plan. When that force came to be exerted through the Government's control of *all* copper (unmistakably shown in the extracts from the report of the War Industries Board by Bernard M. Baruch its Chairman, a public document printed as an exhibit in claimant's motion to remand, pp. 36-40), then that plan of procedure plus the control thus back of it was effectual without any further commandeering orders. That plan of procedure, that method of placing the orders under §§ 120 and 123 of the National Defense Act was effected through the contracts with the United Metals Selling Company and the employment of all the agencies described by the Court below, especially in Findings IX-XIV thereof (R. pp. 17, 18).

(2)

The contracts between the United States and the United Metals Selling Company and their execution, through which the former acquired its copper during the war, show that the orders for claimant's copper were placed under and pursuant to § 120 of the National Defense Act.

Each of those contracts (Finding VIII, R. p. 12) was expressly made "under the provisions of § 120 of an Act

of Congress relating to National Defense, approved June 3, 1916". The fact that that step in the procedure, whereby the United States was controlling all copper and taking in priority all that it needed, assumed the form of an express contract does not militate against the further fact that, through that contract and its execution, *but under and by virtue of § 120 of the National Defense Act, the United States was placing orders with the claimant.*

The consequent position of the United Metals Selling Company, as merely an intermediary, is apparent from a consideration of that company itself, and of the part which it performed in the procurement of copper. "In its business, it confined itself almost exclusively to acting as sales agent for copper-producing companies" (Finding XII, R. p. 18). Therefore, while *in form* it contracted "to make and deliver to the United States" (R. top p. 13) all the vast quantities of copper required by the latter, it was well known that it must necessarily obtain the copper from producers and dealers throughout the country. It is shown by Finding X (R. p. 17) that, during the four months from September 28, 1917, to February 1, 1918, the United States procured through the United Metals Selling Company no less than 283,000,000 pounds of copper for war purposes. This *must* have been the result of the perfected machinery for reaching the real vendors of the copper, with whom the orders were being placed through that one agent.

The United Metals Selling Company's contracts with the United States show that it was to get large quantities of copper from other producers and dealers, and that it was a mere intermediary. Especially this appears as follows:

It got its detailed shipping instructions from the Gun Division, Ordnance Department, in the same manner as was provided in the commandeering orders (Finding VIII, R. p. 16; Finding VII, R. p. 12):

It was required to make personally, in form, every subcontract; but must insert therein a statement "that it relates to a 'main contract' between the contractor and the United States" (Finding VIII, R. p. 15)—even though it contracted expressly with an ultimate producer, it must make its intermediate agency apparent in the very terms of such *subcontract*. It was not in any sense an independent contracting party free to acquire and supply the copper as it might choose:

Page 13 of the transcript of record is replete with evidences of the intermediate agency of the United Metals Selling Co. The fetching of the copper "from refineries *in the interior of the United States*", where manifestly the contractor itself had no refineries; the requirement that the copper should be supplied "in regular commercial shapes * * * *in accordance with the schedule of the several refineries*", and the provision that for extra heavy cakes "the contractor will be paid for extra charge applying thereto in the *particular plant* furnishing copper in such shapes" emphasize the same conclusion. The further provision that "the performance of this contract shall have preference over all *work* for parties other than the United States" shows that in reality it was a *service*, and not a selling of its own material, for which the United Metals Selling Company was employed by the United States.

(3)

The agencies and procedure, through which the United States acquired the copper, point unmistakably to the placing of orders with claimant.

All copper, which in form the United Metals Selling Company ordered from claimant, was for the Government (Finding IX, R. top p. 17). It was all ordered on Government bills of lading. The order was allocated to claimant by the Copper Producers' Committee (Finding IX, R. p. 17). It went forward in continuation of the Government's command under § 120 of the National Defense Act (R. bottom p. 12). It is inconceivable that the United States Government, reaching out as it was doing and had to do for practically all of the copper in the country and having absolute control of every pound thereof (Baruch's report, *supra*), was not in substance and in all fairness and reality placing *its own orders* with the ultimate producers and dealers from whom that copper came.

In so placing its own orders, the United States was doing, with respect to copper, the same as it was necessarily doing with respect to many other commodities, viz.; it was employing, and acting through, numerous and co-related agents and representatives. These were (Findings XII, XIII, XIV, R. pp. 18, 19) in addition to its War and Navy Departments, the Council of National Defense and its subordinate body the War Industries Board, the Copper Producers' Committee, the United Metals Selling Company, and the individuals such as Bernard M. Baruch, Eugene Meyer, Jr., and Hamilton Brush the Secretary of said Committee. The machinery which employed these parts or factors, no inferior one of which alone may ever have placed any mandatory

order with claimant (Findings XIII, XIV, R. pp. 18, 19), was built up and operated for the one fundamental purpose—to carry the Government's order (directly or indirectly) to the ultimate producer or dealer, possessing the copper so much needed. It was machinery essentially the same as that which operated, with respect to underwear for soldiers, in the case of *Roxford Knitting Co. v. Moore & Tierney, Inc.*, 265 Fed. Rep. 177, where the Court refused to countenance the losing of responsibility among so many factors, and found them all used and working together in the process of Governmental placing of orders.

No such system or machinery could possibly have operated to produce the required copper, if there had not been an irresistible force compelling the producers and dealers to honor the orders which came to them, *in form* from the United Metals Selling Company, but *in substance* from the United States. They would have done as they pleased about supplying copper, if there had been no absolute, governmental requirement.

IV.

Claimant was compelled by the United States to transfer and deliver to or for it the 12,542,857 pounds of copper.

This was effected through the plan and method of acquiring copper heretofore discussed (Findings IX-XI, R. pp. 17, 18) plus the absolute control of all copper by the Government. As stated above, this perfected control did away with the necessity for *formal* commandeering orders.

The National Defense Act, so broad and comprehen-

sive in its own terms, was followed by various supplementary and enabling statutes. All hampering restrictions were superseded by such laws, giving to the Executive powers of the broadest possible character with regard to the manner of taking and using raw materials, industries and their products for war purposes. The usual methods of advertising for bids and other formalities were swept aside, and procedure was wholly subordinated to results. (See especially War Department General Order No. 49, dated April 12, 1917.) It may be properly said that the entire industrial resources of the country were in effect commandeered to meet the paramount requirements of the Nation. The President's appreciation of these unprecedented powers is shown by their brief recital in the commandeering orders themselves (Finding VII, R. pp. 11, 12).

The Court below was requested to make an explicit finding with respect to the consequent control of all copper, and the compulsion thus brought against claimant; and that request was urgently repeated in the motion for a new trial. Since that Court made no finding directly as to such control and compulsion—certainly a pivotal question in this case—this Court may find it necessary to remand for further findings (See Motion, pp. 3, 4).

The Findings made by the Court below, however, do point very clearly to such absolute control and compulsion.

This may briefly appear as follows:—

Such control and compulsion, at least as to 2,000,000 pounds of claimant's copper, appear in the formal commandeering orders (Finding VII, R. pp. 11, 12).

Such control and consequent compulsion are shown absolutely and necessarily to have existed, in the "usual way" (first sentence Finding VIII, R. p. 12) adopted and effectually carried out in acquiring *all* copper by the United States through one central agency, the United Metals Selling Company.

The contracts with the United Metals Selling Company were all made pursuant to §120 of the National Defense Act (Finding VIII, R. p. 12). That fact presupposed the use, if necessary, of the force and penalties described by that section (R. p. 2). It is practically unthinkable that the Government put the United Metals Selling Company, only a "sales agent for copper-producing companies" (Finding XII, R. p. 18), in such a position without supplying the means, the control of all copper, whereby the stupendous war demands could be met.

The control and compulsion appeared in the Government's bills of lading, and in the care with which they were numbered and described, and the contracts with the United Metals Selling Company were designated (Finding VII, R. p. 12). This was done under the plan set forth in Findings "IX"- "XI" (R. pp. 17, 18). These things could not rationally have occurred, except as parts of a method of compulsion.

At the meeting of September 28, 1917, the United States acted by and through Eugene Meyer, Jr., in its demand for the immediate delivery of 12,000,000 pounds of copper, and for the dominating control of all other copper in the country (Finding VI, R. p. 10). This was done to perfect the plan or method of procurement begun as early as April 6, 1917 (first sentence Finding VIII, R. p. 12). It cannot fairly be said that, after that meeting, any copper in the country was outside of absolute governmental control.

The meeting of September 28, 1917 was called by the War Industries Board, which acted for the Government (Finding VI, R. pp. 9-11). While that board did not have power to bind the Government by express contract (Findings XIII, XIV, R. pp. 18, 19), it certainly did have power to represent the United States in this important step of perfecting control of all copper; and it was aided at said meeting by Mr. Meyer, who came also as a direct representative of the Secretary of War and carried from him the commandeering orders.

A careful study of page 10 of the record, which sets forth the minutes of the meeting of September 28, 1917, can leave little question but that the purpose and effect of that meeting was to cement and complete the Government's control of all the copper in the country.

How control of copper began in the early part of 1917, and culminated in the meeting of September 28 of that year is fully explained by Bernard M. Baruch in his Report, as Chairman of the War Industries Board, to the President of the United States at his request—a public Government document published March 21, 1921, and entitled “American Industry in the War”. The following extracts from that report are very pertinent:—

(p. 36) “It is the purpose of this book to tell how and why the principal features of direction and *control* were inaugurated in respect to the great body of our industries.”

(p. 37) “A new method of *control* was to be invented here, a method by which one body of officials would sit in judgment to determine the sequence in which materials should be manufactured and orders filled.”

(p. 39) “The fixing of copper prices, as was the

case of steel, brought with it the necessity of control in other directions. *Control* over the distribution of copper was far less difficult than that of steel. While civilian uses of copper are very numerous and very important, they are not nearly so indispensable, particularly for a short period, as those of iron and steel. The war required over 90 per cent of the copper which we could produce."

(p. 40) "The principal responsibility of the Board, after the market had once been stabilized, was to watch over production and take care that it was not diminished; to guard against speculation; and to keep the small producers encouraged to continue their furnaces. *The Copper Producers' Committee, at the direction of the Board, allocated the various orders.*" (Italics ours).

The efficient agent of the Government, whose acts heralded the completion of that process of control at the meeting of September 28, 1917, was Eugene Meyer, Jr. *He there spoke for the United States, and showed what the result of the governmental reaching out for control of all copper had become.* The following brief extracts from the uncontradicted testimony concerning that meeting (Motion, pp. 65-68) show how conclusive his language was.

T. Wolfson, Vice-President of United Metals Selling Co.:—

(p. 65) "And he further said 'Anyone that is not willing to do that I am prepared to go to the limit of commandeering, and in fact I have brought with me commandeering orders anyway', and some of them expressed themselves as very well pleased that he did bring commandeering orders, because that would relieve some of them of certain obligations and others said, 'Well, of course, if the copper is

commandeered we can not help ourselves,' and it was then, after some discussion, decided to form a committee."

(p. 66) "I believe I have already testified to that, that he explained the emergency and told the producers that he was prepared to go to the limit to get all the copper that the United States Government and the allied governments required."

(p. 67) "Mr. Meyer showed the commandeering orders, and my recollection is that he stated that if the orders were not voluntarily accepted by the producers there present, that the copper would be immediately commandeered under those orders which he had."

L. Vogelstein also testified:

(p. 68) "As a matter of fact we were threatened, if we would sell it that all our copper and all our contracts would be commandeered."

It thus appears that claimant's copper (12,542,857 pounds) was taken and used for war purposes by the United States, acting through these various agencies, and in substance under direct statutory authority. *Since its property was so taken and forced from it pursuant to orders placed with it under §§ 120 and 123 of the National Defense Act, it should recover fair and just compensation.*

National Defense Act of June 3, 1916, (Public No. 85; 39 Stat. 166, 213, c. 134);

Roxford Knitting Co. v. Moore & Tierney, Inc., 265 Fed. Rep. 177;

Attorney General v. DeKeyser's Royal Hotel (1920) A. C. 508, 540, 556.

These authorities sustain the logical and only just conclusion that, when a citizen's property is required for war purposes, and an order reaches him through any *media* whatever, and he is compelled by governmental control of that property to deliver it for that purpose, he is essentially in the position of one whose property has been commandeered and is entitled to fair and just compensation therefor.

When the United States acquired control of all copper, the effective commandeering of it was initiate: when the United States took claimant's copper thus controlled, the effective commandeering thereof was consummate.

Finding of Fact XIV (R. pp. 18, 19) is without bearing in the circumstances of this case. It has never been contended that any order for copper was placed with claimant by either the Council of National Defense or the War Industries Board. Under the provisions of Section 120 of the National Defense Act, neither of these bodies was possessed of commandeering or contractual powers. All orders for the coppers here in question were placed by the Secretaries of War and Navy respectively acting for and under direction of the President of the United States through their intermediate agency the United Metals Selling Company. In view of this unquestioned fact, Finding XIV is immaterial.

V.

Claimant duly protested against the price of 23 ½ cents per pound for said 12,542,857 pounds of copper, and insisted on its right to receive 26.881977 cents per pound. It has never waived or relinquished that right.

The only finding by the Court below respecting this matter—made after setting forth the minutes of the meeting of September 28, 1917—is as follows (Finding VI, R. top of p. 11):—

“The plaintiff was present at this meeting and placed in nomination the persons who were elected members of the Producers’ Committee. He raised no objection at this meeting to furnishing copper at the price fixed in the agreement between the producers and the War Industries Board and approved by the President on September 21, 1917”.

There was no cause for plaintiff to make any protest at the meeting of September 28, 1917. The negative statement embraced in the above finding simply leaves the questions open as to whether or not it ever did protest with respect to its compensation for the 12,542,857 pounds of copper, and if so, when, and in what manner.

The Court below was asked, both in the original requests and in the motion for a new trial, to make a finding on this matter (Motion, pp. 3, 4, 28, 29, 32). Its failure to do so may call for a remanding of the case, to obtain such finding.

It was found below, as to claimant:—

“It is not a mine owner, operator, producer or refiner, but a dealer only in ores, minerals and metals”. (Finding II, R. p. 7).

Not being a "producer", it was not called to the conference of September 21, 1917, at which the Government's price of 23½ cents per pound was fixed; and it had nothing whatever to do with that fixing (Finding V, R. pp. 8 and 9).

There is nothing whatever to show that at the meeting of September 28, 1917, that price was mentioned, or that anything was done or said that should have called forth any protest (Finding VI, R. pp. 9-11). True, the commandeering orders handed to claimant's representative at that meeting stated that the price would be 23½ cents per pound, "in accordance with the adoption of a fixed price for copper by the President of the United States" (Finding VII, R. p. 12). But apparently there was no discussion of the price, the purpose of that meeting was not to consider any price but to arrange for an allocating copper producers' committee and its services, and claimant had already begun its protests as to that price and continued them persistently thereafter.

Beginning the day before that meeting, September 27, 1917, when Mr. Vogelstein vigorously protested to Eugene Meyer, Jr. (the Government's representative), claimant's protests and insistence against a possible loss on that copper were clear and emphatic (Motion, pp. 3, 4; 54-61).

Mr. Vogelstein testified, without contradiction, as to his conference with Mr. Meyer on September 27, 1917 (Motion, top p. 55):—

"I told Mr. Meyer in short words that we had not been consulted in fixing it" (meaning the price of 23½ cents) "and that we considered it monstrous that we should be called upon to deliver copper for less money than what it cost us; that the loss which

we would incur would run into hundreds of thousands of dollars; and that we would not stand for such loss."

And further:—

"Mr. Vogelstein, was there prepared by you and Mr. Todd and sent to the Raw Materials Division of the War Industries Board of the Council of National Defense under date of November 15, 1917, an argument and statement regarding the 23½ cents per pound?

Answer. Yes." (Motion, bottom of p. 57).

Mr. Reeves, another member of claimant's attorneys, went soon thereafter and presented in person a formal protest to the War Industries Board (Motion, p. 58).

Under date of October 8, 1917, claimant wrote and sent to Bernard M. Baruch, "Commissioner Raw Materials Division of the War Industries Board of the Council of National Defense", a letter of protest with respect to that price for that particular copper. And on November 15, 1917, it wrote and sent a similar protest, directed generally to the Raw Materials Division of the War Industries Board of the Council of National Defense (Motion, pp. 59-61).

Claimant accordingly, instead of waiving any of its rights, presented full and complete protests as to receiving only 23½ cents per pound for the copper which had actually cost it 26.881977 cents per pound. There was no obligation upon claimant to go further and *resist* the taking by the United States. It was sufficient that it made clear its protest against receiving less than fair and just compensation.

Claimant's acquiescence in the procurement scheme

had no relation to the question of compensation; and on this point the above-quoted evidence is uncontradicted, and affords ample basis for findings as to the various timely protests on the question of price (Motion, p. 5).

Roxford Knitting Co. v. Moore & Tierney, 265
Fed. Rep. 177, 183;
Attorney-General v. DeKeyser's Royal Hotel
(1920), A. C. 508, 531, 540.

Thus claimant comes within the requirement recently stated by this Court (Mr. Justice Holmes writing) with respect to the claim of the American Smelting & Refining Company:—

“But if it had desired to stand upon its legal rights it should have saved the question of the price. It did not do so, but on the contrary, so far as appears, was willing to contract and was content in the main with what was offered.”

American Smelting & Refining Co. v. United States, 258 U. S. —. (No. 221 October Term, 1921, decided May 15, 1922.)

Claimant was not willing to contract nor content with what was offered. It did save the question of the price. It made its position unmistakable by protests which could not be misunderstood. It is entitled to findings on this matter by the Court below; and, if this Court deems such findings necessary to a decision, the case should be remanded for that purpose.

VI.

The necessary cost to claimant of said 12,542,857 pounds of copper was 26.881977 cents per pound.

Findings III and IV show this to be true (R. p. 8). Finding III shows that, of the 43,851,042 pounds of copper which claimant had on hand at the close of business September 20, 1917, 34,687,579 pounds were purchased *under long-term contracts*, which otherwise unexplained means they were necessarily purchased; and it is to be assumed, because there is no finding to the contrary, that claimant's business just as necessarily demanded the purchase of the other 9,163,463 pounds in the open market. When Finding III further states that the cost of the entire mass was \$11,788,027.17, the average cost per pound becomes a mere matter of division—26.881977 cents per pound.

No finding (such as that numbered IV, R. p. 8) was needed to the effect that claimant could not identify specific purchased lots of copper with specific sold lots. Of course it could not do so. The Court will judicially notice that the identity of specific portions of large masses of bulk copper in the rough (as ore or matte) is lost in the processes of smelting and refining, just as the identity of bags of grain is lost in grinding it together with other quantities of the same material. Such facts are matters of common knowledge.

Phillips v. Detroit, 111 U. S. 604, 606;

King v. Gallun, 109 U. S. 99;

State v. Bodden, 165 Wis. 75, 80; s. c. 160 N. W. Rep. 1077.

The findings also show that it was the action of the Government, in fixing the price of copper at 23½ cents,

to go into effect on September 21, 1917, which caused claimant to have on hand and unsold the 12,542,857 pounds of copper at the close of business on September 20, 1917. While the fixing of that price was by agreement "between the producers of copper and the Government" (Finding III, R. p. 8), yet it became a governmental act binding on all dealers of copper (Findings V, VI, R. pp. 8, 9, 10); it was adopted as "a fixed price for copper by the President of the United States" (Finding VII, R. p. 12); and it was owing to the well-known imminence of that act that claimant was unable to sell all its copper, even at the price, less than its average cost, at which most of it had been sold, by the end of September 20, 1917 (Finding III, R. p. 8).

The negotiations and proceedings leading up to the governmental fixing of $23\frac{1}{2}$ cents as the price of copper were between the *producers* of copper and the United States. *Claimant was not a producer, but only a dealer* (Finding II, R. p. 7). It had nothing to do with the fixing of the price.

The determination of the cost per pound to claimant, by finding the *average* cost of the entire 43,851,042 pounds, was not only the one feasible method, but it was also the method generally adopted and applied by the courts. Thus, where large quantities of the same kinds of goods or merchandise have been commingled and a partial loss or partial disposition thereof occurs, there is uniformly a *pro rata* distribution, an averaging, to determine the loss, or price, per unit. It is that principle and practice, for example, which is applied under the rule of general average in case of losses at sea.

Beattie v. New York & Long Island Construction Co., 196 N. Y. 346, 355;

Nelson v. Belmont, 21 N. Y., 36, 38, 39;
The Idaho, 93 U. S. 575, 585;
Dows v. Eckstrone, 3 Fed. Rep. 19;
*Jennings-Heywood Oil Syndicate v. Houssiere-
 Latreille Co.*, 127 La. 971, 998.

If there should be an uncertainty from the existing findings respecting the foregoing matters, and especially if it should still be questionable whether or not claimant *unavoidably* had the 12,542,857 pounds on hand and unsold, the case should be remanded for a specific finding on that point. Its having that quantity on hand at the close of business on September 20, 1917, was unavoidable, as is proved by the uncontradicted testimony of Mr. Vogelstein (Motion, pp. 41-49). He there shows that claimant bought no more copper in the year 1917 than it was absolutely required to buy pursuant to its long-term contracts, which antedated the entrance of the United States into the war; and he also shows that in that year down to September 21, it sold every pound of copper that it possibly could sell.

VII.

Claimant is entitled to be paid, for all of the 12,542,857 pounds of copper, the necessary cost price to it, 26.881977 cents per pound.

The minimum value of that copper, the fair and just compensation to which claimant is entitled is its necessary cost. There being no finding or evidence that for any reason it was worth more or less to claimant, and there being no market price other than that fixed by the Government's fiat, its cost is taken as its settled value.

Wilcox v. Consolidated Gas Co., 212 U. S. 19, 42;
Masterton v. Mayor of Brooklyn, 7 Hill (N. Y.),
 61;

United States v. Speed, 8 Wall. 77, 85;

Hinckley v. Pittsburgh Bessemer Steel Co., 121
 U. S. 264, 274;

United States v. Behan, 110 U. S. 338, 344;

Guerini Stone Co. v. Carlin, 240 U. S. 264; 280;

Newcastle Breweries, Lim. v. Regem, (1920) 1
 K. B. 392.

In the first-cited of these cases, this Court said (212 U. S. 42):—

“The value of real estate and plant is to a considerable extent matter of opinion, and the same may be said of personal estate *when not based upon the actual cost of material and construction*”. (Italics ours).

Thus the actual cost was clearly recognized as the *prima facie* criterion of value—of fair and just compensation—in such cases as that now at bar.

In *Masterton v. Mayor of Brooklyn*, 7 Hill (N. Y.), 61, it was decided that the normal measure of damages on default of a contractual vendee of goods to be manufactured is the difference between the cost of their manufacture and the contract price. This Court has spoken of that case as leading (*United States v. Speed*, 8 Wall. 77, 85), and in its other decisions here cited has followed that criterion as to damages. The Court of Appeals of New York has done the same.

Oswego Falls Co. v. Stecher Lith. Co., 215 N. Y.
 98, 105.

The cost of production is the fair and just value of such property to its manufacturer or owner; and his fair profit is the difference between the cost and a contract price.

Claimant's situation with respect to the 12,542,857 pounds of copper involved in this action was unique. The prevailing market price at which it was compelled by its long-term contracts to take that copper was higher (26.881977 cents per pound) than was the *fiat* price of the Government when fixed. Therefore the producing vendors under those contracts forced that copper at that higher price on claimant. *This would not have been done but for the imminence of the governmental fixing of price.* It would not be fair or just for the power which thus compelled claimant to have that copper at that higher cost to take *that copper* at less than that cost. All the residue of claimant's copper taken by the Government during the War—and there were upwards of fifty million pounds so taken—was acquired by claimant and willingly supplied to the United States at its fiat price.

It is respectfully submitted that the statement at the end of Finding III, "after September 20, 1917, the market price of copper was 23½ cents per pound," is either misleading, or must be read as referring to the mere *fiat* price fixed by the Government (Finding V, R. pp. 8, 9). It certainly could not mean the ordinary market price as fixed by supply and demand and all the other elements involved in normal trading in copper. Assuredly this Court will give the only possible fair meaning that it can have when read in the light of the other findings and the well known facts.

If it should be argued that uncertainty as to the average cost exists, because in theory it is possible that some

small quantity of copper which ought to have been included in claimant's computation of cost price was not so included, the conclusive answer is that it is sufficient in such cases that practical accuracy in the computation is shown.

Hetzel v. Baltimore & Ohio R. Co., 169 U. S. 26, 37;

Johnson & Higgins v. Harper Transportation Co., 228 Fed. Rep. 730, 743;

United States Trust Co. v. O'Brien, 143 N. Y. 284, 288;

Critchfield v. Julia, 147 Fed. Rep. 65, 71, 73;

Corpus Juris, Vol. 17, pp. 759-763 *et seq.*

The rules as to certainty in such cases were well expressed by Mr. Justice Peckham, before his call from New York to this Court, in *United States Trust Co. v. O'Brien*, 143 N. Y. 284, 288, as follows:—

“In using the words ‘certainty, speculative and contingent’, for the purpose of excluding that kind of damage, it is not meant to ascertain that the loss sustained must be proved with the certainty of a mathematical demonstration. • • • Certainty to a reasonable extent is necessary, and the meaning of that language is that the loss or damage must be so far removed from speculation or doubt as to create in the minds of intelligent and reasonable men the belief that it was most likely to follow from the breach of the contract and was a probable and direct result thereof.”

If A owns one thousand bushels of wheat, all alike, and sells two hundred of them at cost price, he properly ascertains that price per bushel by dividing the total cost of the entire mass by one thousand, even though he

may have acquired the whole in smaller lots, at different times and at varying costs per bushel. There is no other way to do it after his purchased lots are inextricably mingled.

Hurff v. Hiers, 11 Vroom (N. J.) 581;

Kimberly v. Patchin, 19 N. Y. 330;

Foot v. Marsh, 51 N. Y. 288.

The plaintiff had a large mass of copper, 43,851,042 pounds, composed of many smaller quantities acquired through dominating purchase contracts, all inextricably commingled in passing through smelter and refinery. The logical, normal and only practical way of finding the cost of any one of these pounds is by dividing the total cost by the total number of pounds—by average.

Conclusion.

It is respectfully submitted that the judgment of the Court below should be reversed, and judgment ordered in favor of the claimant as prayed for in the petition; or, if deemed necessary to a proper determination of this appeal, that the case should be remanded to the Court of Claims for further findings as requested in appellant's motion for such relief.

Dated, January 20, 1923.

Respectfully submitted,

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Attorneys for Appellant.

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In the Supreme Court of the United States.

OCTOBER TERM, 1922.

L. VOGELSTEIN & COMPANY, APPELLANT,	}	No. 269.
v.		
THE UNITED STATES.		

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

This is an appeal from a judgment of the Court of Claims dismissing the petition upon findings of fact made after trial of the issues. The suit was brought to recover the sum of four hundred twenty-four thousand one hundred ninety-six and 54/100 (\$424,196.54) dollars, together with interest, which amount is alleged to have been the difference between the price paid by the Government for 12,542,-857 pounds of copper at 23½ cents a pound and what would have been a just and fair compensation for the same, which is alleged to be slightly in excess of 26.88 cents per pound. From the findings by the Court of Claims the following facts appear:

(1)

The plaintiff is a New York corporation with a capital stock of \$5,000,000 divided into 50,000 shares, L. Vogelstein being the real owner of all, or substantially all, of them. Its business was and is the purchasing of ores, having them smelted and refined and then selling the refined ores to its customers. It is not a mine owner, operator, producer, or refiner. (First and second findings, p. 7.)

At the close of business on September 20, 1917, the plaintiff had on hand, sold but not delivered, and unsold, 43,851,042 pounds of copper, 34,687,579 pounds of which had been purchased as unrefined copper under long term contracts, and 9,163,463 pounds had been purchased as refined copper in the open market. The cost of the entire mass was \$11,780,027.17, the average cost per pound being 26.881977 cents. Of this entire stock 31,308,183 pounds had been sold at 26.34389 cents per pound. There remained in the ownership and possession of the plaintiff 12,542,857 pounds which it had been unable to sell at the same price owing to the fact that an agreement between the producers of copper and the Government fixing the price of refined copper at $23\frac{1}{2}$ cents per pound would go into effect on September 21, 1917. The difference between the average cost price of the 43,851,042 pounds and the selling price fixed by the agreement was 3.381977 cents per pound. *After September 20, 1917, the market price of copper was $23\frac{1}{2}$ cents per pound.* (Third finding, p. 8.)

There is nothing in the evidence nor in the records of the plaintiff to show the actual cost of the 12,542,857 pounds of unsold copper. All the unrefined copper purchased by the plaintiff was shipped directly to the United States Refining Company under a contract between the plaintiff and that company, and after smelting and refining it was shipped on order of the plaintiff by that company to plaintiff's customers. It was impossible for the plaintiff to give, from its records, the cost price of any of the different lots of copper sold by it. It may have sold copper purchased by some other dealer. It only knew how much copper it had in bulk at the refinery. (Fourth finding, p. 8.)

Prior to September 21, 1917, and after the presentation of a report by the Federal Trade Commission, the War Industries Board called before it the copper producers of the country and gave notice to the public of such meeting in order that all interests might be represented. After discussion between the copper producers, represented by a committee, and the War Industries Board, a voluntary agreement was reached which was approved by the President on September 21, 1917. A memorandum of that agreement is set forth in the fifth finding (p. 8). This agreement fixed the price of copper at $23\frac{1}{2}$ cents per pound, f. o. b. New York, subject to revision after four months.

The meeting on September 28, 1917.

For the purpose of carrying into effect that agreement, a meeting of copper producers was called by the Commissioner of Raw Materials of the War Industries Board for September 28, 1917. At that meeting Mr. Vogelstein was present and a motion was unanimously adopted providing for a committee, to be known as The Copper Producers' Committee, to act for the copper producers in carrying out the agreement of September 21, 1917. The representatives present were asked to submit to Mr. Brush, secretary of the committee, prior to noon September 29th, a statement of their estimated stock of copper on hand October 1st, together with their estimated production for the months of October, November, December, and January, together with a further statement covering all outstanding sales due as of October 1, 1917, for delivery prior to February 1, 1918. No objection was raised to the statement that it was the sense of the meeting that all marketable copper, beginning with October 1st, should be placed at the disposal of the United States Government and its allies. Upon the plea of Mr. Eugene Meyer, Jr., that the Government was in immediate need of about 12,000,000 pounds of copper, it was agreed that Mr. Wolfson, secretary of the Advisory Committee, should receive instructions from the Ordnance Department to ship immediately 12,000,000 pounds of copper, and several of the producers present agreed to receive such instructions in quantities agreed upon with Mr. Wolfson. Mr. Vogelstein was

present at this meeting and placed in nomination the persons who were elected members of the Producers' Committee, and he made no objection to furnishing copper at the price fixed in the agreement. (Sixth finding, pp. 10 and 11.)

At this meeting Mr. Meyer, who was present at the request of the Commissioner of Raw Materials of the War Industries Board, and who had with him a number of mandatory requisitions for about 12,000,000 pounds of copper, signed by the Secretary of War, and drawn up under the provisions of Sections 120 and 123 of the Act of June 3, 1916, 39 Stat. 213, commonly known as the National Defense Act, distributed the orders among the producers and dealers present. Two for 1,000,000 pounds of copper each were handed to the plaintiff. *This was done at their request in order that they might be protected from suits for damages for breach of contract with their private customers, and not because the Government intended to procure copper under such orders* (p. 11). The orders were all identical except as to the person addressed and the amount of copper to be furnished. The two orders given to the plaintiff are set forth in the seventh finding of fact, page 11.

It was understood and agreed between the producers and dealers in copper, including the plaintiff and the United States, that no copper would be required by the United States under the mandatory orders referred to, but that the 12,000,000 of copper named would be obtained in the usual way through

the contracts between the United States and the United Metals Selling Company which were entered into from time to time, beginning April 6, 1917. The form of this contract is set forth in the eighth finding, beginning on page 12. It is a contract between the United Metals Selling Company and the United States of America, represented by Colonel Hoffer, Ordnance Department, United States Army, as contracting officer, whereby the contractor agreed to make and deliver to the United States 65,000,000 pounds, more or less, of refined copper. It seems to be unnecessary to consider all the provisions of this contract, and it is sufficient to say that it provides with great detail as to the place of delivery, time of delivery, delays, payments, disputes, etc., and fixes as the price to be paid by the United States 23½ cents per pound, f. o. b. cars, New York.

The Government's method of obtaining copper.

The plan adopted for obtaining the copper by the Government was for the War and Navy Department to send an order to the United Metals Selling Company directing it to ship a certain number of pounds of copper to some specified party on bills of lading forwarded with the order. This order was sent to the Producers Committee, which returned it to the United Metals Selling Company with the name of the producer or dealer, on whom the order should be made, endorsed thereon. Thereupon the United Metals Selling Company placed its own order with the producer or dealer named by the Producers

Committee, requesting that it "please ship" a certain number of pounds of copper to a designated party at a certain time on the attached bill of lading, giving the numbers of the same and also the number of the contract with the Government against which the order was shipped and stating the price to be paid as $23\frac{1}{2}$ cents per pound. No order was placed with the United Metals Selling Company by the Government unless there was a contract with the company against which it could be charged. Sometimes an order would be sent in advance of the contract, but the contract would always follow. (Ninth finding, page 17.)

The first contract between the United States and the United Metals Selling Company was dated April 6, 1917, and called for the delivery of 20,000 000 pounds of copper at a little more than 16.67 cents per pound. In all nine contracts were made, the last being dated March 20, 1918, and the price named in each except the first two was $23\frac{1}{2}$ cents per pound. The total number of pounds which the company agreed to deliver was 343,336,734, and the number of pounds delivered under the procedure herein set forth, from September 21, 1917, to February 21, 1918, a period during which the copper out of which this suit arose, was in round numbers 283,000,000 pounds. (Tenth finding, p. 17.)

Orders were placed by the United Metals Selling Company with the plaintiff in accordance with the procedure described in the ninth finding at various times between September 21, 1917, and February 1,

1918, for different amounts of copper. The plaintiff thereupon issued its order to the United States Metals Refining Company to ship the copper as requested by the order of the United Metals Selling Company on bills of lading furnished with the order. During that period the plaintiff shipped in this way among other copper the 12,442,857 pounds which remained unsold in its possession, as before described, and received from the said Selling Company 23½ cents per pound. (Eleventh finding, p. 17.)

The Council of National Defense was created by Section 2 of the Act of August 29, 1916, 39 Stat. 649, 650, "for the coördination of industries and resources for the national security and welfare." It consisted of the Secretaries of War, Navy, Interior, Agriculture, Commerce and Labor. Among its other powers was authority to organize subordinate bodies for its assistance in special investigations, and, in pursuance thereof, by resolution of March 31, 1917, it organized the General Munitions Board, by one clause of which it provided that "such committee shall have no authority at this time to issue purchase orders, make contracts, or bind the Government in the purchases; all these things to be done as at present by the respective departments." And by resolution of July 28, 1917, the Council organized the War Industries Board to supersede and take the place of the General Munitions Board. (Thirteenth finding, p. 18.)

The fourteenth finding of fact made by the Court of Claims was as follows (p. 18):

The evidence fails to show that either the Council of National Defense or the War Industries Board ever placed, or attempted to place, any mandatory orders under the act of June 3, 1916, with the plaintiff, or ever entered into, or attempted to enter into, any contracts with the plaintiff to obtain copper or any other metal.

The judgment of the Court of Claims was rendered on June 13, 1921. Thereafter, on August 11, 1921, plaintiff filed a motion for a new trial and to amend findings. On October 10, 1921, the court overruled the motion. On October 16, 1922, the appellant submitted a motion to this court to remand to the Court of Claims, for further finding of fact, and on October 23, 1922, this court announced that the motion had been reserved for consideration in connection with the whole case on the merits.

The Baruch Report.

In appellant's brief reference is made to the report of the War Industries Board made by Mr. Baruch, its chairman, as described in its motion to remand. From this report it appears that "The War Industries Board remained a subordinate body to a council having advisory powers only." (Motion to remand, pp. 36, 37.)

This report, in discussing the matter of copper, says that the Board's first action was an appeal to the large producing and smelting interests, and that this appeal resulted on March 20, 1917, in an understanding by which the Army and Navy were enabled to

purchase their requirements to be delivered quarterly for a year, at a little over 16.67 cents a pound, which represented the actual average price obtained by the United Metals Selling Company over a period of ten years from 1907 to 1916. The market quotations for that date were 35.74 cents per pound, and sales were being made as high as 37 cents. The copper industry was the first one to come forward with its offer, and followed, as it was, rapidly by other trades to sell to their own Government its war needs at prewar prices had an important psychological effect upon prices generally. The agreement of September 21, 1917, was the first "negotiated price-fixing arrangement ever established by the United States Government; * * * The industry, though dissatisfied, had finally acceded. They believed that at least it gave them a definite program and would bring stability." Within a week many questions began to arise with respect to the administration of the scheme, and among the other questions decided was that all outstanding bona fide contracts between producers and consumers might be consummated at contract prices. Some of these were 27 cents per pound, but under the priority agreement the Government had first call and the Allies second, and as these two purchasers consumed nearly all of the supply, few high priced orders could be filled. (Ibid. pp. 38 and 39.)

Appellants' "protests."

With respect to the so-called protests made by Mr. Vogelstein, it appears from the motion to remand that

on the 27th of September—that is, the day before the meeting which Mr. Vogelstein attended in New York—he met by appointment Mr. Meyer, in Washington. (Ibid. p. 55.) He told Mr. Meyer that he had not been consulted and considered it monstrous that he should be called upon to deliver copper for less money than it had cost. Mr. Meyer stated that he was very sorry that somebody had to get hurt, and “he was sorry that it was me.” He also saw Mr. Wolfson and Mr. Clendenin. After Mr. Vogelstein attended the meeting in New York on September 28th, at which he acquiesced in everything that was done and asked to have one of the so-called mandatory orders given to him, his company wrote a letter to Mr. Baruch on October 8, 1917, in which he points out that the price, as fixed, was “fair enough for copper to be thereafter provided,” and says:

Importers, however, were not considered. They were compelled by outstanding contracts with foreigners to accept ores and pay for same at Engineering & Mining Journal prices in some cases at dates of shipment, which prices were much higher than 23½ cents. This material having to arrive and be refined the copper was not available for months later. It having been pointed out last spring that the Government was contemplating the fixing of a reduced price for copper, consumers deferring purchasing except for absolute needs, we were, therefore, unable to sell all of this imported copper. (Ibid. p. 59.)

It appears, therefore, that the real contention of the appellant is based upon the fact that on September 21, 1917, he was unfortunate enough to have acquired, many months before, about 12,000,000 pounds of copper which he had been unable to dispose of because of the feeling in the copper trade that the Government would soon fix a lower price than that which prevailed in the market.

His grievance is set forth in a proposed finding (motion to remand, p. 54) as follows:

But, before furnishing any copper to the Government and while furnishing the said 12,542,857 pounds, plaintiff did protest to the Government against the price of $23\frac{1}{2}$ cents per pound for that copper; and those protests were made on the ground that $23\frac{1}{2}$ cents per pound was not fair and just compensation for said 12,542,857 pounds of copper, because it had necessarily cost the plaintiff 26.881977 cents per pound, and said exception is taken upon the ground that the facts proposed to be found are ultimate and material to claimant's case and are established by the following uncontradicted evidence, cited in support of said motion:

This is really the point of the case: whether or not plaintiff was entitled to receive more for his copper than its fair value *as copper*, because it had cost him more.

Before the 21st day of September, 1917, the plaintiff endeavored to limit, as far as possible, the amount of copper which it accepted under its outstanding con-

tracts, and endeavored to impress upon all shippers that it was really their price which had been fixed and that there was no reason why they should be better off under the presidential proclamation than others. It was unsuccessful in impressing this view and was forced to live up to its contracts, but it did not take an ounce beyond what it was forced to take. (Motion to remand, page 43.)

Mr. Vogelstein testified (motion to remand, p. 44) that against the purchases which appellant was in the habit of making from day to day, it endeavored to sell at a profit whatever quantities it was buying and always had a certain bulk of purchased material against which it had a certain bulk of sold material. Sometimes the purchases were ahead of the sales, and at other times the sales were ahead of the purchases. In the period terminating the 21st of September, 1917, it had endeavored to balance its purchases by sales, and in that endeavor had sold copper right along below cost with a loss, with the idea of taking a small loss rather than to hold onto it.

In the conduct of its business it was desirable from time to time to limit the risk and it went into the market and bought refined copper if it felt that it had sold more copper on a certain date than was safe. The copper business is not an exchange business; it comes sporadically, and "you sometimes, in order to make a sale, have to sell more than suits your position or suits your judgment." (Ibid. pp. 45, 46.)

On October 8, 1917, plaintiff wrote a letter to Mr. Baruch, in which he says that the copper price fixed

by an agreement between the Government and the producers was fair enough for copper to be thereafter provided, because producers could adjust their affairs to producing copper at the new price, but felt that as to its unsold balance of imported copper it stood on a different footing. In this letter it states:

We do not wish, however, to do anything without your entire concurrence and approval. We feel that the injustice of taking at 23½¢ copper which cost us in cash much more is manifest and so we ask that you take this one feature under consideration with a view to a fair adjustment.

We are entirely at your service to present this matter in detail or to furnish any facts or information which may be of service to you. (Ibid. pp. 59, 60.)

On November 15th the plaintiff addressed a letter to the Raw Materials Division of the War Industries Board, in which it sets forth that:

We are largely importers of copper ores and occupy a unique position in the trade. For reasons hereafter stated we were compelled without intent or fault on our part to accumulate a large stock of crude material at prices averaging slightly below 27 cents per pound for copper contents. Standing in the unique position of importers we were not considered when the price was fixed by the producers and the Government, and the result is that entirely inadvertently we are singled out to bear large losses not sustained by the metal dealers generally, in that a large stock of unrefined

copper which cost us nearly 27 cents per pound of copper contents is now taken and must be sold at $23\frac{1}{2}$ cents per lb.

We appreciate the necessities of present conditions. We recognize the propriety of the acts of your board in fixing a price for copper. We have done, and will do, all that we can to uphold and cooperate with your board.

And the letter asks that a full inquiry be made into its case, which it feels confident will convince a fair-minded body that "we are justly entitled to consideration." (Ibid. pp. 60, 61.)

After the meeting of September 28, 1917, plaintiff was requested to consent to supplying copper to the Government according to the plan set forth in finding No. 9, and at first objected to doing so, but thereafter withdrew its objection and consented to that plan. On October 15, 1917, the Copper Producers' Committee wrote to the plaintiff, stating in substance that (with reference to the requisitions distributed by Mr. Meyer at the meeting on September 28th) complications had arisen which made it necessary to handle the 12,000,000 pounds as one contract between the United States Government and the United Metals Selling Company; that, in order to make the plan effective, it was necessary for each one of the companies who received the original requisitions from Mr. Meyer to write to the Ordnance Department at Washington and request that the contract be made direct with the United Metals

Selling Company, and urging the plaintiff to write such a letter. The Committee would then assemble all the letters and forward them to the Ordnance Department. In response to that letter the plaintiff did as requested. (Ibid. pp. 63, 64.)

ARGUMENT.

I.

In furnishing copper at the fixed price, appellant did not act under duress in any legal sense.

Prior to September 21, 1917, Vogelstein & Company found itself in this situation: It was not a mine owner, producer or refiner, but had been in the business of purchasing ores, having them smelted and refined, and selling the refined products to its customers. In the course of its business it would buy ores and make sales against its purchases. It would also sell copper and purchase against its commitments. In the language of the market place, sometimes it would be "long," and sometimes "short," of copper. There had been, after the breaking out of the world war, a great advance in the price of copper, and much speculation. The average price over a period of ten years from 1907 to 1916 had been between 16 and 17 cents a pound. On March 20, 1917, the market quotations were over 35 cents a pound, and sales were being made at 37 cents. When it became understood that in all probability a price would be fixed, the market declined rapidly. Between that date and September 21, Vogelstein & Company did their best to limit their purchases of copper and

also to get rid of what they had on hand and actually sold more than 31,000,000 pounds at less than cost; but, in spite of all they could do, they found themselves in the unfortunate situation of being long about 12,000,000 pounds of copper, while, in the vernacular, "the bottom had dropped out of the market."

In this situation Mr. Vogelstein bestirred himself. He came to Washington and saw Mr. Baruch and Mr. Meyer and besought their help. He made no claim that $23\frac{1}{2}$ cents a pound was not a fair price for copper. His complaint was solely upon the ground that he was entitled to special consideration because his copper had cost him more than $23\frac{1}{2}$ cents. Special emphasis is laid upon the claim that the appellant "necessarily" or "unavoidably" had this copper, and the court is asked to remand the case for a finding of this fact. But this can mean nothing more than that it had misjudged the copper market during the preceding months and possibly years. The copper which appellant had did not represent any specific amount purchased at a specific price at a specific time, but was a balance from many purchases and sales at various prices, and its cost was an average of many transactions. Vogelstein & Company had misjudged the market, and had the copper "unavoidably" merely because they had bought more than they had been able to sell before the market went against them. Their situation, while unfortunate, was no different from that of any man who had been trading in a fluctuating market in a commodity

and the like that would arise," was selected, the members of that committee were placed in nomination by the plaintiff. He made no objection to furnishing copper at the price fixed in the agreement of September 21, 1917. Among the other things done at the meeting was to request those present to submit to the secretary of the committee a statement covering all outstanding sales for delivery prior to February 1, 1918, and it does not appear that Mr. Vogelstein claimed that he had any such outstanding commitments. In fact, it is quite clear that he did not have any, because if he was "necessarily" long of his copper it meant that he had no such outstanding commitments, and furthermore, within a week, the agreement was modified so as to permit delivery under all bona fide outstanding contracts.

During the progress of the meeting it appeared that Mr. Meyer had with him a number of mandatory requisitions for about 12,000,000 pounds of copper, signed by the Secretary of War, and that he distributed these among those present *at their request, in order that they might be protected from suits for damages for breaches of their contracts with private customers, and not because the Government intended to procure copper under such orders.* Two of these orders, each for 1,000,000 pounds of copper, were handed to the plaintiff. Though he had no outstanding contracts, the reason why he desired to obtain these orders is not difficult to determine. This present suit affords the answer. Though he had been endeavoring for months to sell his copper

at a price sufficient to secure him against loss, he had been unable to do so, and of course he knew that he could not sell it in the market for more than $23\frac{1}{2}$ cents a pound. But if he could get the Government to commandeer it, and if he protested loudly enough, he would get his $23\frac{1}{2}$ cents anyway and might acquire a cause of action against the United States at the same time. The only customer from whom he could hope to get more than $23\frac{1}{2}$ cents was the Government; hence his desire for a commandeering order. It is to be noted, however, that there was no sign of protest from him then. He agreed with everything done and raised no objection to furnishing the copper at the agreement price (p. 11). It may be that he was attempting to "beguile the time." In appellant's brief, page 28, it is stated, referring to the price of $23\frac{1}{2}$ cents a pound:

There is nothing whatever to show that at the meeting of Sept. 28, 1917, that price was mentioned, or that anything was done or said that should have called forth any protest.

This is not quite candid. The minutes of the meeting show that Messrs. Clendenin and Wolfson reported the result of the negotiations which led to the agreement "fixing the price of copper referred to in the statement made public by the President, September 21, 1917, and suggested the necessity of a committee to act for the copper producers in the premises" (p. 10). That was what the meeting was for. Mr Vogelstein knew all about the agreement of September 21, and had been to Washington the day before

to see Mr. Meyer about it, and the two orders which he commandeered at the meeting stated that the price to be paid would be $23\frac{1}{2}$ cents per pound (p. 12). It may be true literally that this price was not mentioned. Perhaps it was taken for granted. But to imply that these gentlemen attended this meeting, placed their resources at the disposal of the Government, appointed a committee to carry out the agreement, and accepted the orders as protection against suits for breach of contract, without thorough understanding of the fundamental fact that the price was $23\frac{1}{2}$ cents a pound, and that they were to receive that and no more for their copper, is to cast unmerited reflection upon their very great intelligence.

However, Mr. Vogelstein, as the Court of Claims finds, raised no objection to the statement "that it was the sense of the meeting that all marketable copper, beginning with October 1st, should be placed at the disposal of the United States Government and its allies" (p. 10), and raised no objection to "furnishing copper at the price fixed in the agreement" of September 21 (p. 11). When he succeeded in getting the two orders signed by the Secretary of War, it may be that he felt that he had found a way to get more for his copper than the agreed price, but if so, he must have experienced a sense of disappointment when he found shortly afterward that there was to be no commandeering; that all the copper was to be furnished by the United Metals Selling Company under contract. Though he objected to this, nevertheless his company consented to it in writing.

Thereafter all copper furnished by the plaintiff was furnished under that arrangement. The copper supplied by the plaintiff was furnished to the United Metals Selling Company, it received from that company compensation at the agreed rate of $23\frac{1}{2}$ cents per pound, and, as the Court of Claims finds, the evidence fails to show that either the Council of National Defense or the War Industries Board ever placed, or attempted to place, any mandatory orders with the plaintiff, or ever entered into, or attempted to enter into, any contracts with the plaintiff to obtain copper or any other material.

It seems to us that these facts carry with them an unanswerable argument against the claim of the plaintiff. The copper was not requisitioned or commandeered by the Government. This procedure was abandoned with the consent of the plaintiff. The Government did not obtain the copper from the plaintiff in any way, nor was the plaintiff known to the respective parties of the Government in the transaction. The Government's dealing was wholly with the United Metals Selling Company, and its relations with that company were purely contractual. The dealings between the plaintiff and the United Metals Selling Company were wholly voluntary, the result of an agreement made at a meeting which Mr. Vogelstein attended and in which he not only participated actively but in which he seems to have been a leading spirit. In a general way he may have yielded to the situation more than he would have done under other circumstances. It may well be

that pride made him reluctant to antagonize the most prominent and influential men in the copper industry. It may have been patriotism.

Perhaps, as a shrewd business man, he was making the best of what was to him a bad situation. Neither the War Industries Board, the Copper Producers' Committee nor the United Metals Selling Company had commandeering authority, and neither attempted to exercise that power. The only commandeering orders issued by the Secretary of War were later superseded in the manner hereinbefore pointed out. If the plaintiff had desired to put itself in the position to sue anybody, it should have refused to fill the orders placed with it by the United Metals Selling Company or declined to do so until proper requisitions or commandeering orders were issued.

The case of *American Smelting & Refining Company v. United States*, decided by this court on May 15, 1922, involved the claim of over \$500,000 for the price of about 20,000,000 pounds of copper at 26 cents a pound, less payments received at 23½ cents. The Government had some correspondence with the United Metals Selling Company, ending in an order or proposal for 30,000 metric tons of copper to be delivered on or before June 1, 1918. The company replied on March 26th that the Copper Producers' Committee had divided the handling of copper and had given the export business to the American Smelting & Refining Company. The letter requested that the order be changed to apply to the last-named company. There was further correspondence which

amounted, as this court held, to a contract. All the copper was delivered prior to July 2, 1918, except the 20,000,000 pounds in controversy. This copper it was impossible to deliver until after that date. No shipping orders for it had been received, and after that date the price of copper was advanced by the price fixing committee to 26 cents a pound, and the American Smelting & Refining Company claimed that it was entitled to that price. In its opinion, delivered by Mr. Justice Holmes, this court said:

The only serious argument is the supposed duress. But that can not prevail. It may be true that the claimant was yielding to the statute in a general way and did not discriminate between what it was required to yield and what it could reserve. But if it had desired to stand upon its legal rights it should have saved the question of the price. It did not do so, but on the contrary so far as appears was willing to contract and was content in the main with what was offered. As was pointed out by the Court of Claims, the acceptance was sent because the claimant was advised by the Government that no payment could be made until the claimant had accepted in writing the Government's proposal, whereas no acceptance was necessary if the order was a compulsory requisition. We are of opinion that the claimant must stand upon the letters of March 28 and April 11. * * *

* * * We have said nothing about repeated requests that the claimant should sign a formal contract, its refusals, and its

ultimate signing under protest, because these facts in no way modify the relation of the parties under the contract by letters already made.

Much of this reasoning applies to the present case. The appellant did not stand upon any legal right. At the meeting on September 28 it entered into the agreement there made. Afterwards, when requested to become a party to the agreement to sell through the United Metals Selling Company, it agreed. It did not have to do so, if its copper had been requisitioned.

II.

Appellant's so-called protests were not based on any legal ground.

Appellant made, so far as appears, no protest to the Secretary of War or any other officer clothed with actual power; nor did it claim that the price fixed was not a fair price for copper. Mr. Vogelstein's general attitude was that of a man trying to get Mr. Baruch and Mr. Meyer to help him obtain special consideration. When they declined, he joined in with the other members of his group. If he had refused to deliver copper to the United Metals Selling Company without formal requisitions orders, they might not have been forthcoming at all. That company might have declined to do business with Vogelstein & Company, and obtained its copper from the producers, who were supplying it in immense quantities. The Government might have deemed the comparatively small quantity of Vogelstein's copper of so slight importance as to be disregarded.

Indeed, it would seem as if the doctrine of estoppel would bar the plaintiff's claim as against the Government. The Government was dealing with the United Metals Selling Company. All of its payments were made to that company. It had no reason to suspect that the price it was paying to that company for its copper was not being received in full, and, if it had been informed that one of the firms, which was supplying a small quantity of copper, proposed to sue the Government for additional compensation upon the ground that its copper was being commandeered at an unfair price, it might have told that company not to accept any orders from Vogelstein & Company. Indeed, if the Producers' Committee had entertained any idea that Vogelstein & Company were not honestly and in good faith coöperating with the rest of them in their scheme, they might very well have refused to have any dealings with them, and Vogelstein & Company would then have been left in the position where they would have had to sell their copper to some one else at $23\frac{1}{2}$ cents, hold it or wait for it to be commandeered. If they had sold their copper to other purchasers at $23\frac{1}{2}$ cents per pound, they would clearly have no claim against the Government. *Morrisdale Coal Company v. United States*, decided May 29, 1922. If they had held their copper indefinitely, it is a problem what would have been done with it. What they actually did now appears to have been a seeming compliance with the situation and a coöperation with all the other men engaged in the same industry, but with the lurking hope that,

through the present suit, they would really fare better than any of their fellows; that by process of law the public treasury would make good the losses which they have sustained by improvident speculation in copper.

III.

Appellant received just compensation for its copper.

But even if it be held that the plaintiff's copper was requisitioned, the record, nevertheless, shows that the price paid was fair and just compensation. As has already been pointed out, it was the price agreed upon by the trade at large as a fair price. In that respect it represents the uncontradicted testimony of the most expert witnesses in the country. It was the price at which the producers sold not only to the Government but to the public at large. It was the "market price," as the Court of Claims finds as a fact (p. 8).

Appellant, therefore, received just compensation for its copper.

Mr. Justice Brewer, speaking for the Court and considering the meaning of the words "just compensation" in the Fifth Amendment, said in *Monongahela Navigation Company v. United States*, 148 U. S. 312, 326:

"* * * the natural import of the language would be that the compensation should be the equivalent of the property. And this is made emphatic by the adjective 'just.'" * * * And this just compensation, it will be noticed, is *for the property*, and *not to the owner*. (*Italics ours.*)

Compensation must be just "not merely to the individual * * *, but to the public * * *."

Bauman v. Ross, 167 U. S. 548, 574.

"'Market value' means the fair value of the property, as between one who wants to purchase and one who wants to sell any article, not what could be obtained for it under peculiar circumstances, when a greater than its fair price could be obtained; not a speculative value; not a value obtained from the necessities of another." *Lawrence v. City of Boston*, 119 Mass. 126, 128.

Even Mr. Vogelstein admits that the price was fair for copper, and his only claim for more is because his particular copper cost more. But what the owner is entitled to receive is the value of the property "without reference to the person of the owner or the actual state of his business." *Pittsburgh & Lake Erie Railway Company v. Robinson*, 95 Pa. St. 426, 430.

The price paid by the appellant under the circumstances of this case is no evidence of actual value. All refined copper of the kind furnished is alike. No private purchaser would think of paying Vogelstein & Company more for copper than was charged by other dealers, merely because they had bought while the market was high. And neither Vogelstein & Company, nor any other business man, would for a moment expect anybody but the Government to pay them more than the market price. If Vogelstein & Company had been unfortunate enough to have acquired their 12,000,000 pounds while the market price

was 35 cents a pound, we do not think they would for a moment make the claim that the Government should pay them that price for it, and if, on the contrary, they had been shrewd enough to have acquired the 12,000,000 pounds while the price was 15 cents a pound, the Government would not have been justified in refusing to pay them less than $23\frac{1}{2}$ cents a pound. In other words, the Government was paying Vogelstein & Company a fair price for copper, neither attempting on the one hand to make good their losses, nor on the other hand to deprive them of a profit. The value of a pound of copper to-day is the same whether it was purchased yesterday at 25 cents a pound or ten years ago at 16 cents a pound, and the value of the copper owned by Vogelstein & Company on the 28th day of September, 1917, was neither greater nor less because it had cost them 35 cents a pound or only 16 cents a pound, or than it would have been in the hands of another firm which had paid more or less for it.

The market value of refined copper of the grade mentioned in the contract with the United Metals Selling Company was, on the 28th day of September, 1917, $23\frac{1}{2}$ cents a pound, a price taking into consideration all varying costs of production, insuring to labor the maximum wages and affording a profit which would be an incentive to maximum production. What fairer basis of market value could be found? It was the price at which 283,000,000 pounds of copper was sold to the Government between Sep-

tember 21, 1917, and February 1, 1918, by the United Metals Selling Company. It was the price at which, as alleged in appellant's petition (p. 5), it purchased at least 25,000,000 pounds of copper or, as stated in its brief (p. 36) upward of 50,000,000 pounds, which it sold to the Government. So if the Government did actually requisition the 12,000,000 pounds in suit, appellant could have replaced it at $23\frac{1}{2}$ cents in the market, and the price at which property can be replaced in the open market is full compensation for its loss. *Woonsocket Mach. & Press Co. v. N. Y., N. H. & H. R. R. Co.*, 239 Mass. 211.

These considerations lead to the following conclusions:

(1) The plaintiff did not act under duress in any legal sense of the term. Pride, patriotism and business sagacity may have exerted an influence, but the fact remains that Vogelstein & Company allied themselves with the other men in the copper trade in a voluntary agreement to furnish copper to the United States and its allies at an agreed price.

(2) Such protests as were made were in substance merely personal appeals to influential men like Mr. Meyer and Mr. Baruch for special consideration and were not assertions of any intention to stand upon legal rights. Indeed, they were not based upon any legal right unless the Government, in taking a commodity with a recognized market value like copper, must pay not the market price but a price to be determined by the needs, conditions and previous dealings of each particular owner.

(3) Whether requisitioned or not, the plaintiff received just compensation for his copper; that is, the fair market price—the price which all the great producers of the country had agreed upon, not merely as the price at which they would sell to the Government but the price at which they would sell to the general public—the price which the Court of Claims has found as a fact was the market price of the copper furnished.

CONCLUSION.

The motion to remand should be denied. The additional findings which the appellant desires to have made are immaterial in view of the findings which have been made.

The judgment of the Court of Claims should be affirmed.

JAMES M. BECK,
Solicitor General.

ALFRED A. WHEAT,
Special Assistant to the Attorney General.

FEBRUARY, 1923.



Affirmed.

L. VOGELSTEIN & COMPANY, INC. v. UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 269. Argued March 5, 6, 1923.—Decided May 21, 1923.

Just compensation for copper taken by the United States for war purposes under the Act of June 3, 1916, c. 134, §§ 120, 123, 39 Stat. 215, is to be measured by the market value of the copper at the time of the taking, and not by higher prices which the owner was obliged to pay under long time purchase contracts. P. 340.
56 Ct. Clms. 362, affirmed; motion to remand denied.

APPEAL from a judgment of the Court of Claims.

Mr. Alfred G. Reeves and *Mr. Frederic D. McKenney*, with whom *Mr. Russell H. Robbins* was on the brief, for appellant.

Mr. Alfred A. Wheat, Special Assistant to the Attorney General, with whom *Mr. Solicitor General Beck*, *Mr. Assistant Attorney General Lovett* and *Mr. J. Robert Anderson*, Special Assistant to the Attorney General, were on the brief, for the United States.

MR. JUSTICE BUTLER delivered the opinion of the Court.

Between September 28, 1917, and February 1, 1918, the United States obtained from appellant 12,542,857 pounds of copper and paid 23½ cents per pound therefor. By

its petition, appellant asks judgment for \$424,196.54, being 3.381977 cents per pound, in addition to the price paid. The Court of Claims made findings of fact, and as a conclusion of law held that appellant was not entitled to recover, and dismissed the petition. From that judgment this appeal is taken.

The Court of Claims found that the market price of copper was 23½ cents per pound. The United States insists that payment of the market price was just compensation. The appellant claims that there was no express contract of sale; that the copper was taken pursuant to mandatory orders, and that it did not waive its right to just compensation. It submits that the finding of the Court of Claims, that after September 20, 1917, the market price of copper was 23½ cents per pound, must be read as referring to a mere fiat price fixed by the United States, and that it does not mean the market price as fixed by supply and demand and other elements in normal trading in copper. It asserts that the necessary cost of the copper to it was 26.881977 cents per pound, and demands that price.

It appears from the findings that appellant purchased ores, minerals and metals, had them smelted and refined, and sold the refined products. It was not a mine owner, operator, producer or refiner. On September 20, 1917, at close of business, it had on hand 43,851,042 pounds of copper. It had purchased 34,687,579 pounds as unrefined copper under long term contracts, and 9,163,463 pounds as refined copper in the open market. The average cost to appellant was 26.881977 cents per pound. Out of the stock then on hand, it had sold 31,308,183 pounds at 26.34389 cents per pound. There remained 12,542,857 pounds.

It further appears that some time before September 21, 1917, an agreement was made by the War Industries Board with copper producers fixing a price of 23½ cents

per pound for copper, and this agreement was approved by the President on that date. September 28, 1917, Vogelstein, who controlled appellant, attended a meeting of copper producers and government representatives and placed in nomination the persons who were chosen at that meeting as members of a committee to act for the copper producers in carrying out the agreement of September 21st, and to coöperate with government representatives in securing performance of the agreement and to take the necessary measures to that end. The United Metals Selling Company was the sales agent for copper producers, and the plan adopted for obtaining the copper for the United States was for the War and Navy Departments to send orders and shipping directions to the Selling Company. The orders were sent to the producers' committee, which returned them to the Selling Company with the name of the producer or dealer on whom the orders should be made. Thereupon the Selling Company placed its own order with the producer or dealer named, requesting the shipment to be made, and stating the price to be paid as 23½ cents per pound. The Selling Company from time to time, beginning April 6, 1917, made a number of contracts for the furnishing of copper to the United States. The first two, respectively dated April 6 and April 21, covered 45,100,000 pounds at 16.6739 cents per pound. Later contracts covered 297,826,734 pounds at 23½ cents per pound. Between September 28, 1917, and February 1, 1918, the period in which appellant's copper here involved was obtained, about 283,000,000 pounds were furnished the United States under these contracts. In appellant's petition it is stated that since September 21, 1917, it sold and delivered to the United States at least 25,000,000 pounds of copper, which cost it substantially 23½ cents per pound, the price it received from the United States. Appellant's contention that there was no market price other than that fixed by the fiat of

the United States is without support. The price so found uniformly prevailed during the period in question. Appellant coöperated with others having copper to sell in putting into effect and maintaining that price. The finding of the Court of Claims is plain and cannot be read as referring to a mere fiat price. It is not impaired, but is supported and confirmed by other findings. The appellant is bound by it.

It contends that when the price was fixed at 23½ cents per pound, it unavoidably had on hand the 12,542,857 pounds of copper in question; that this copper was requisitioned and taken upon mandatory orders pursuant to §§ 120 and 123 of an Act approved June 3, 1916, c. 134, 39 Stat. 213, 215, and that it protested against the price. It moves to remand the case with directions to find facts with reference to these claims. Assuming all these matters of fact in favor of appellant and considering the case as if they had been so found by the Court of Claims, the United States' contention that appellant has received just compensation must be sustained. The market price was paid. ~~The market value~~ of the copper taken at the time it was taken measures the owner's compensation. *Seaboard Air Line Ry. Co. v. United States*, 261 U. S. 299; *United States v. Chandler-Dunbar Water Power Co.*, 229 U. S. 53, 80, 81; *Boom Co. v. Patterson*, 98 U. S. 403, 407; *United States v. New River Collieries Co.*, 276 Fed. 690, affirmed this day, *infra*, 341. The higher prices, if any, paid by appellant for the copper it was compelled to take on long time purchase contracts are not evidence of the value of the copper at the time it was obtained by the United States. The United States is under no obligation to make good the loss. Appellant would be entitled to the gain if it had purchased at less than the market price at the time of taking.

The motion to remand is denied, and the judgment appealed from is affirmed.